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On page 68 of this issue will be found an interesting article on "Can a president approve a bill after the adjournment of congress? the contention being for the affirmative. The question has had fresh agitation on account of a recent decision of Judge Knott of the Washington Court of Claims, to the effect that the president has such power provided he exercise it within ten days. The case is likely to go to the United States Supreme Court, which has never had an opportunity to pass on the question. The opinion of such commentators upon the constitution as Story has been the other way—that the power of the president over a bill ceases with the adjournment of the session. Such has also been the unbroken practice. As the moment of adjournment approaches there is always a great rush to secure the executive signature, under the belief that he cannot lawfully affix it an instant afterwards. But there are important precedents on the other side. The original constitution of New York contained a provision on this subject almost identical with that of the federal constitution and the court of last resort of that State ruled that the governor could exercise the power after the adjournment of the legislature, not only within the period of ten days but up to the end of the term for which the legislature had been elected. Lincoln approved what was known as the captured property act, eight days after the adjournment of congress and the constitutionality of the act thus signed was recognized as valid. It would be in the public interest if the president could have more time to consider the mass of bills which are always hurried through in the closing hours of a session, and, if he really possesses this power, it ought to be affirmed by the Supreme Court so that he may exercise it without question.

In a recent issue of this JOURNAL we reported the case of DeCamp v. Archibald, in which the Supreme Court of Ohio held that the power conferred on officers taking depositions to commit a witness for contempt for refusing to answer is not a "judicial" power within a constitutional provision conferring all judicial power upon the courts of the State. (38 Cent. L. J. 186.) The more recent Kansas case of *In re* Sims, is contrary thereto, holding that a proceeding to punish for contempt is in its nature a criminal proceeding and that the committing a witness for contempt for refusing to testify is the exercise of judicial power. The exact point decided was that Paragraph 2543 of the Kansas General Statutes of 1889, so far as it attempts to confer on county attorneys the power to commit witnesses for contempt on account of a refusal to be sworn or testify as provided in that section is unconstitutional and void. Each of the judges delivered an opinion. The substance of the ruling is well stated in the following language of Chief Justice Horton: "If the statute is constitutional and open to no legal objection, county attorneys have the power to ask questions of the witnesses brought before them, and then to pass upon the competency or pertinency of the same, and if the witness refuses to answer, to imprison him in the county jail, there to remain until he submits to testify. It is an old maxim of the law that 'no man can be a judge in his own cause.' This wise maxim is infringed upon by conferring on a prosecuting attorney judicial power to commit a witness called before him to testify in a case which he is preparing for trial, or in which he proposes, if his investigation warrants, to file a complaint or information. In such a proceeding, on the examination of a witness, the prosecuting attorney has a pecuniary, professional and official interest. He is not acting disinterestedly. The statute would be very similar, and liable to like objection, if it authorized notaries public and attorneys at law to personally take depositions or perpetuate testimony in actions they were intending to commence for other parties. In a civil action, no deposition or affidavit can be taken before a relative, or an attorney of either party, or before any one interested in the event of the proceeding. Sec. 350, Civil Code; Foreman v. Carter, 9 Kan. 681; Warner v. Warner, 11 Kan. 121."

NOTES OF RECENT DECISIONS.

TELEGRAPH COMPANY—MISTAKE IN TRANSMITTING MESSAGE—LIMITING LIABILITY.—In Primrose v. Western Union Telegraph Co., 14 S. C. Rep. 1098, the Supreme Court of the United States in a long and exhaustive opinion by Mr. Justice Gray consider some important questions in the law pertaining to telegraph companies. It was held that a regulation of a telegraph company requiring the sender of a message to have it repeated, at an additional charge of one-half the regular rate, in order to hold the company liable for mistakes or delays in transmitting or delivering, or for not delivering the message, whether happening by negligence of its servants or otherwise, is reasonable and valid. Stipulations, forming part of the terms under which messages are sent by a telegraph company, that it will not be liable in any case for errors in cipher or obscure messages, and that no employee of the company is authorized to vary this restriction, are not unreasonable or against public policy. Where a message is written by the sender on a telegraph company's blank having on its face, above the message and below his signature, brief and clear notices that the messages is to be sent subject to terms printed on the back of the blank, such terms, so far as not inconsistent with law, form part of the contract between him and the company under which the message is transmitted, although he testifies that he does not remember reading them. A telegraph company is not liable to the sender of a message for losses on purchases of wool caused by a mistake in transmitting it, where it was in cipher, wholly unintelligible to the company and its agents, and they were not informed of the nature, importance, or extent of the transaction to which it related, or of the probable consequences, if it were transmitted incorrectly, although they knew that the sender was a wool merchant, and that the person addressed was in his employ.

CARRIERS OF GOODS — INTERSTATE COMMERCE—LIMITATION OF LIABILITY.—Among other points decided by the Court of Civil Appeals of Texas, in Gulf, C. & S. F. Ry. Co. v. Eddins, it is held that Act Tex. March 4, 1891, providing that any stipulation in a contract shall be void which limits the period in which to sue thereon to less than two years, or which requires notice of claim for damages to be given within less than 90 days after the damage, is applicable to interstate shipments, and is not void as being a regulation and interference therewith. Fisher, C. J., says:

At the time the contract of shipment was executed and the loss occurred, the act of March 4, 1891, was in force. The act reads: "Be it enacted by the legislature of the State of Texas: That it shall hereafter be unlawful for any person, firm, corporation, association or combination of whatsoever kind to enter into any stipulation, contract or agreement by reason whereof, the time in which to sue thereon is limited to a shorter period than two years. And no stipulation, contract or agreement for any such shorter limitation in which to sue, shall ever be valid in this State. Sec. 2. No stipulation in any contract requiring notice to be given of any claim for damages as a condition precedent to the right to sue thereon shall ever be valid unless such stipulation is reasonable and any such stipulation fixing the time within which such notice shall be given at a less period than ninety days shall be void, and when any such notice is required, the same may be given to the nearest or any other convenient local agent of the company requiring the same. That in any suit brought under this act it shall be presumed that notice has been given unless the want of notice is specially pleaded under oath." It is contended by the appellant that, as the contract of shipment in this case is interstate, this act has no application, and, if applicable, is void, as an attempt to regulate interstate commerce. We think that the act applies to interstate as well as domestic contracts of shipment, and, if void as being a regulation and interference with interstate commerce, the answer presented good defenses if the facts should show that the stipulations pleaded were reasonable. The question arises, does the act in question interfere with or regulate interstate commerce? We think not. Stipulations in contracts of interstate shipments limiting the time in which to sue and give notice have been, prior to this statute, permitted only when they were reasonable; and the courts have denied the authority of the carrier to impose upon the shipper a contract limiting the time in which these things should be done, if, from the facts of the case, it appeared that the stipulation as to the time was unreasonable. Railway Co. v. Harris, 67 Tex. 168, 2 S. W. Rep. 574; Express Co. v. Darnell (Tex. Sup.), 6 S. W. Rep. 766; Railway Co. v. Garrett (Tex. Civ. App.), 24 S. W. Rep. 354, and cases cited. These authorities, with others that might be cited, demonstrate that the State courts interpose their remedial relief to the operation of unreasonable stipulations that the carrier by the terms of the contract of shipment seeks to impose upon the shipper. The decisions in effect, declare that the power lies in the State courts to determine and adjudicate the question whether the time limited in contracts of this character is reasonable or unreasonable, and that the exercise of this jurisdiction does not interfere with or regulate interstate commerce. It cannot be said that the matter of time is a question solely judicial in character, and about which, for that reason, a legislature may not act. But time, or the reasonableness of time, in which rights may be lost or acquired by reference to periods of limitation, is a

matter that is not solely delegated to the courts, but may be, and should be, determined by the lawmaking branch of the State government. If the courts have the power to pass upon and determine that stipulations of interstate contracts of shipment as to time in which suits shall be brought and notice of loss given are reasonable or unreasonable, why may not the legislature, when acting within the authority that authorizes it to create statutes of limitation that effect remedies, prescribe a time in which these things shall be done or not done? It seems to us that the legislature is the proper body to exercise this function, and that these statutes should be treated as in the nature of statutes of limitation. Express Co. v. Caperton, 44 Ala. 103; Railway Co. v. Harris, 67 Tex. 168, 2 S. W. Rep. 574. If treated as a statute of limitation, it simply affects the remedy, and does not attempt to affect the rights of the parties, or to control or regulate in any manner interstate commerce. It is the undoubted power of the State to pass laws prescribing periods of limitation in which remedies may be enforced, and to declare that limitation shall not within a certain time affect contracts that are made and entered into within its jurisdiction, or sought to be enforced there. We cannot perceive how legislation of this character could be said to in any manner affect interstate commerce. It does not impose any burden upon it. It does not regulate it, nor does it interfere with it. Railway Co. v. Dwyer, 75 Tex. 578, 12 S. W. Rep. 1001. The only effect it has is to prescribe a time in which the remedy shall be limited. The act is general in effect, and applies alike to all persons, either natural or artificial, that are capable of contracting. It does not single out commerce, and undertake to regulate it, or to impose restrictions upon it; but the broad purpose of the act is simply to prescribe a period of time in which contracts executed within this State shall not be affected by limitation. It prescribes a period of limitation that simply affects the remedy, and not the merits. 13 Am. & Eng. Enc. Law, 703-768.

The constitutionality of State statutes of limitation as affecting those provisions of the federal constitution that prohibit the States from passing any law which may impair the obligations of contracts or from taking property without due process of law has frequently been passed upon by the Supreme Court of the United States, and the doctrine there established that such statutes are constitutional, and in no wise affect the contract or property rights of the parties, but simply concern the remedy. 13 Am. & Eng. Enc. Law, 695-700. These statutes of limitation, resting upon the theory that they only affect the remedy and procedure, and not the merits or rights of the parties, are, in actions at law, enforced in controversies arising in the federal courts. *Id.* 772. In Sherlock v. Alling, 93 U. S. 99, it is said "that legislation of a State, not directed against commerce, or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit;" and it was held that a State statute giving a remedy to the personal representatives for damages resulting from the death of the relative against the carrier would be enforced. In Smith v. Railroad Co., 63 N. H. 25, it is held that a State law making a railroad liable for damages done by fire from its locomotives applies to railway engaged in interstate traffic, and is not a regulation of commerce. The case of Johnson v. Elevator Co., 119 U. S. 400, 7 Sup. Ct. Rep. 254, decides the question that a State statute of Illinois giving a lien upon vessels for damages occasioned by it will be enforced against the vessel, although it was engaged in interstate commerce. It was held in that case that the statute was not a regulation of commerce. In Smith v. Alabama, 124 U. S. 477, 8 Sup. Ct. Rep. 564 (cited with approval in Nashville, C. & St. L. Ry. Co. v. Alabama, 128 U. S. 97, 9 Sup. Ct. Rep. 28), the court say: "It is among these laws of the States, therefore, that we find provisions concerning the rights and duties of common carriers of persons and merchandise, whether by land or by water, and the means authorized by which injuries resulting from the failure properly to perform their obligations may be either prevented or redressed. A carrier exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable according to the laws of the State for acts of non-feasance or misfeasance committed within its limits. If he fail to deliver goods to the proper consignee at the right time or place, he is liable in an action for damages under the laws of the State in its courts; or if, by negligence in transportation, he inflicts injury upon the person of a passenger brought from another State, a right of action for the consequent damage is given by the local law. In neither case would it be a defense that the law giving the right to redress was void as being an unconstitutional regulation of commerce by the State. This, indeed, was the very point decided in Sherlock v. Alling, 93 U. S. 99, above cited. If it is competent for the State thus to administer justice according to its own laws for wrongs done and injuries suffered, when committed and inflicted by defendants while engaged in the business of interstate or foreign commerce, notwithstanding the power over those subjects conferred upon congress by the constitution, what is there to forbid the State, in the further exercise of the same jurisdiction, to prescribe the precautions and safeguards foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, it is admitted the State has power to redress and punish? If the State has power to secure to passengers conveyed by common carriers in their vehicles of transportation a right of action for the recovery of damages occasioned by the negligence of the carrier in not providing safe and suitable vehicles, or employees of sufficient skill and knowledge or in not properly conducting and managing the act of transportation, why may not the State also impose, on behalf of the public, as additional means of prevention, penalties for the non-observance of these precautions? Why may it not define and declare what particular things shall be done and observed by such a carrier in order to insure the safety of the persons and things he carries, or of the persons and property of others liable to be affected by them?" In Railway Co. v. Becker, 32 Fed. Rep. 849, it is held that, although an act may indirectly affect commerce, it may not regulate it, and will not be held void. In Hart v. Railway Co., 69 Iowa, 485, 29 N. W. Rep. 597, it is held that a State statute that imposes limitations upon the power to contract by a carrier for the carriage of freight does not regulate commerce, and that such a statute is within the proper exercise of State legislative authority. As bearing upon the question under discussion, the following cases may be read in addition to those quoted: Railway Co. v. Dwyer, 75 Tex. 578, 12 S. W. Rep. 1001; Rhea v. Railway Co., 50 Fed. Rep. 17; State v. Indiana & I. S. Ry. Co. (Ind. Sup.) 32 N. E. Rep. 817; Railroad Commission Cases, 116 U. S. 307, 6 Sup. Ct.

Rep. 334, 348, 349, 388, 391, 1191; Harrigan v. Lumber Co., 129 Mass. 588; Horn Silver Min. Co. v. State, 143 U. S. 312, 12 Sup. Ct. Rep. 403; Ficklen v. Shelby Co., 145 U. S. 19, 12 Sup. Ct. Rep. 810; Budd v. New York, 143 U. S. 528, 12 Sup. Ct. Rep. 468. For judicial decisions determining this question, resting as it does on the Constitution of the United States, this court should look to those promulgated by the Supreme Court of the nation. When we reach this field of investigation, we find that this court has, during the period of the judicial history of the question, occupied many and conflicting positions in dealing with it. But the three last cases, cited *supra*, which we regard as of the more recent expressions of that eminent court, seem to recognize the principle that, although State legislation may indirectly, incidentally, and remotely affect interstate commerce, it will not burden, regulate, and impede it; and unless it goes to this extent, it is not obnoxious to the federal constitution upon that subject. Many laws a State may pass that may incidentally affect interstate commerce, but will not control or regulate it, within the meaning of the commerce, clause of the constitution; and this authority exists whether such laws are the proper exercise of the police power of the State or not. The case of Budd v. New York reaffirms the doctrine of the Granger Cases in 94 U. S. 113, 155, 164, 179-181, which were cited with approval in the Commission Cases, 116 U. S. 307, 6 Sup. Ct. Rep. 334, 348, 349, 388, 391, 1191. These cases decided that a State statute that in some degree affected the business of warehouses engaged in interstate commerce was a matter of domestic concern, and was not repugnant to the constitution. This ruling was subsequently shaken by the cases of Wabash, St. L. & P. Ry. Co. v. People of Illinois, 118 U. S. 557, 7 Sup. Ct. Rep. 4; Robbins v. Shelby Co., 120 U. S. 489, 7 Sup. Ct. Rep. 592; and Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. Rep. 1380,—and these latter cases, we think, the court declined to follow to their full extent in deciding Budd v. New York and Ficklen v. Shelby Co. We do not think the statute in question is a regulation of interstate commerce, in the sense that would render it obnoxious to the "commerce clause" of the constitution. Judgment affirmed.

NEGLIGENCE—TEAMS—MEETING ON HIGHWAY—FAILURE TO TURN OUT.—In Walkup v. May, it was held by the Appellate Court of Indiana that a special verdict finding that defendant, while driving a bus, at a trot, along a street, met plaintiff, driving in the opposite direction; that defendant negligently failed to turn to the right, and give plaintiff half the street; that plaintiff was obliged to get out of the beaten track, where his sleigh, without his fault was overturned; that at the point of passing the road on defendant's right was level for 15 feet from the traveled roadway; that there was an electric light within 40 yards of the place; that both parties were familiar with the place; and that all damages were caused by defendant's negligence, will not support a judgment for plaintiff, it not appearing that the defendant did or could have seen plaintiff in time to turn out, or that plaintiff did not discover, in time to avoid the accident, that defendant was not going to turn out. Gavin, J., says:

The law of the road requires travelers in vehicles on public highways to keep to the right when they meet, and it also requires, as a general rule, that each should give half the road. Rev. St. 1894, § 6837; Beach, Contrib. Neg. §§ 282, 283, and cases there cited; 12 Am. & Eng. Enc. Law, 957, *et seq.* If one negligently fails to give his share of the road, and a collision and damage occur thereby, or if damages occur in the effort to avoid a collision, he must answer for his negligence. The cause of action of the party injured arises from the negligence of the other, and so as in other actions for negligence it is incumbent upon him to prove negligence upon the defendant's part, as the proximate cause of the injury and freedom from contributory negligence upon his own part. Parker v. Adams, 12 Metc. (Mass.) 415; Beach, Contrib. Neg. *supra;* 12 Am. & Eng. Enc. Law, *supra*, and cases there cited. Keeping these propositions of law in mind, we proceed to examine the special verdict. From it we learn that on February 4, 1893, appellants' servant, Sharpe, was driving a bus on Water street, in Crawfordsville, and met appellee driving his mare hitched to a small sleigh and going in the opposite direction; "that said Sharpe was driving said bus in a careless and negligent manner, and said Sharpe negligently failed and refused to turn to the right, or to give plaintiff one-half of said street;" that to avoid a collision appellee was compelled to give more than half the road, and get out of the beaten track, and upon the slanting side of the road, where his sleigh, without any fault or negligence upon his part, slid into a ditch, whereby his sleigh was overturned, and certain damage resulted; that at the point where the teams passed one another the street upon Sharpe's right was level for a distance of 15 feet from the traveled roadway; that Sharpe failed to give any of the road; that there was an electric light about 40 yards from the place, which was lighted; that Sharpe was driving in a trot, and both parties were familiar with the surroundings and condition of the street; that all of the damage "was caused by the carelessness and negligence of said Sharpe, and without any fault or negligence on the part of plaintiff." This is all of the finding which in any manner throws light upon the conduct of appellants or their servant. From these facts we are unable to see how an inference of negligence can be drawn against appellants. Their driver had certainly the right to drive his bus along the street in the traveled way in a trot, nor was he under any obligation to turn aside, unless the presence of appellee upon the road was known to him, or ought to have been. The verdict does not show how far the parties had traveled upon this street in either direction. For aught that appears, appellee may have turned into it the instant before the parties met. It does not show that Sharpe saw appellee before the accident, nor in time to have turned out for him. Neither does it appear that it was light enough for him to see him, nor that he was not on the lookout. It is true, an electric light was lighted 40 yards away, but whether its light reached this place does not appear. It may have been obstructed by trees, or around the corner, so far as the verdict shows. In the facts found there is absolutely nothing to show that Sharpe was apprised of the appellee's approach, or could have learned of it in time to have avoided the accident. The statement that

Sharpe was driving in a "negligent" manner, and "negligently" failed to turn out, cannot supply the want of the facts showing negligence. Railway Co. v. Burger, 124 Ind. 275, 24 N. E. Rep. 981. In Railroad Co. v. Spencer. 98 Ind. 186, it is said: "It is not sufficient to state facts not in themselves constituting negligence, and then by an epithet or conclusion of law characterize them as negligent, but the facts must be so stated as to afford the court grounds for adjudging that the law is that they do constitute negligence." In Railway Co. v. Grames, 135 Ind. —, 34 N. E. Rep. 714, on page 718, Judge Coffey says of this and another case: "The two first cases hold, and we think correctly, that a general statement of the jury in a special verdict, to the effect that a particular act was or was not negligent, is the statement of a mere concluclusion, and will be ignored by the court." The Supreme Court in that decision recognize that there are cases where it is the province of the jury to determine the question of negligence as an ultimate inferential fact, this right existing where the facts are such that different conclusions may reasonably be drawn from them. Railway Co. v. Castello, *supra*. It is, however, in such cases, essential that the jury should set out in their verdict both the primary and the final inferential facts, in order that the court may determine whether or not different conclusions may reasonably be drawn from the primary facts. Since it is our conclusion that no negligence is found against appellant, it is unnecessary that we should take up in detail the findings upon the subject of contributory negligence. The rules which are laid down as governing the question of negligence apply equally to that of contributory negligence. The same care should be observed in seeing that facts are fully set forth, so that, if negligence or want of negligence is found as an inferential fact, this court may know the basis upon which such finding rests. We are unable to see that the cases of Railroad Co. v. Brunker, 128 Ind. 542, 26 N. E. Rep. 178, and Conner v. Railway Co., 105 Ind. 62, 4 N. E. Rep. 441, lend any substantial aid to appellees' position.

CRIMINAL LAW—GRAND JURY—INFLAMATORY CHARGE BY COURT.—A wide discretion is allowed to the presiding judge in directing the attention of the grand jury to particular subjects of inquiry, or to particular offenses or classes of offenses, and that discretion appellate courts will not assume to control. But where a party indicted, in the honest belief that he has been prejudiced by an abuse of discretion by the judge in his charge to the grand jury, in respectful language alleges the action of the judge as error, in order to secure a ruling thereon, he is not guilty of contempt of court. This doctrine was laid down by the Supreme Court of Nebraska in Clair v. State, 59 N. W. Rep. 118, although they mistook his remedy by assailing the charge of the judge by motion instead of by plea. It was also ruled that the existence of facts which will warrant the finding of an indictment is a question for the grand jury, and should not, as a rule, be assumed by the judge, and that the term inflamatory as applied to a charge to the grand jury which after assuming that the crime of bribery had been committed, and that it was the duty of the jurors to indict therefor, concluded as follows: "There comes up from the people a command for a forward march all along the line of your duty. You should give heed to that cry, for it comes from a patient and long-suffering endurance which has at last reached its limit, is a merited criticism." The court said, *inter alia:*

We are constrained, after a careful consideration of the subject, to regard the objection made to the charge so far as it assumes the commission of the crime of bribery, as a merited criticism. While doubtless intended as an admonition to the jurors with respect to their duty, it cannot be construed otherwise than as an invasion of their province which amounts to an abuse of discretion. The finding or presentment of the grand jury, of necessity, includes two elements, viz: First, the *corpus delicti;* and second, a finding that the offense named was committed by the persons charged. Both facts must be found by the jurors, and cannot be dictated by the judge. The history of the English constitution presents no more interesting or instructive field for study than the long and stubborn contest between the people and commons on one side, and the ministers and judges on the other side, concerning the independence of grand and petit juries, and the right of judiciary to dictate verdicts and bills of indictment. We are told that during the existence of the star chamber it was the practice to punish jurors by fine and imprisonment for refusing to find verdicts and indictments when commanded by the judges; and according to 2 Hall. Const. Hist. Standard ed. 227, such punishments were not infrequent at the time of the Restoration, in 1660, and until declared to be illegal by Sir Matthew Hale, who subsequently said: "The privilege of an Englishman is, that his life shall not be drawn in danger without due presentment or indictment, and this would be but a slender screen or safeguard if every justice of peace, or commissioner of oyer and terminer, or gaol delivery, may make the grand jury present what he pleases, or otherwise fine them." 2 Hale, P. C. 161. The development of this branch of the law during the next century is shown by the observation of Mr. Chitty in his treatise on Criminal Law, vol. 1, p. 312, where, referring to the duty of the court in charging the grand jury, he says: "In the performance of this duty the judicious magistrate will take care, not only that his remarks are, in general, suited to the offices which a grand jury have to discharge, but have a plain reference to local objects, events, discussions and concerns, as far as they properly fall within the limits of his jurisdiction, and seem entitled to his notice. He will strive to allay animosities, to destroy the spirit of party, to discountenance every receptacle of idleness and vice, as well as every vestige of popular barbarity and grossness." The trend of judicial sentiment in this country is illustrated by the language of Justice Field, of the Supreme Court of the United States, who, in charging a grand jury in the year 1872, said it was designed as a means of not only bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizens against unfounded accusation, whether it comes from government, or be

prompted by partisan passion or private enmity, see, 2 Sawy. 669. In the recent case of State v. Turlington, 102 Mo. 642, 15 S. W. Rep. 141, it was shown on the trial of a plea in abatement that in charging the grand jury which returned the indictment for murder, the presiding judge had said: "Your sheriff has been assassinated — not assassinated, but murdered—in the jail of your county, by one whom he had in charge at the time. It is your duty, gentlemen, to investigate this matter. The crime is no greater because it was committed in the jail, for murder is murder, and the aggressor is equally responsible for the crime as if he had met his victim on the street and shot him down. What the circumstances of the killing were is not for me to say. It is my duty to give the charge to the jury, and it is then your duty to hear this matter when it comes before you, and treat each party fairly; and, after your determination of the case, the court sits here for the protection of the accused as well as for the public. Whether the crime was committed in the jail I don't know, and it is not for me to say; but if you find that such a murder has been committed in your jail, whether it was the object of this party to secure his liberty or not, makes no difference whatever. It is my duty, gentlemen, to charge you in regard to this matter. It is your duty to investigate the matter, and, if you find the facts sufficient to justify you in believing that there has been a murder committed in your jail, you should find an indictment against the party committing it." The charge was held not prejudicial on account of the caution contained in the concluding paragraph; but, referring to the language quoted above, the Supreme Court say: "It is manifestly improper for a circuit judge, in his charge to a grand jury, to express an opinion as to the guilt or innocence of a party accused of a crime to be investigated. The action of the grand jury is a part of the judicial proceedings which may terminate in a conviction and sentence of the accused. The court sits in judgment between the State and her citizens, and should "hold the scales with a firm hand, without bias or prejudice." The language of the judge in this case was improper, and cannot be justified. It is true that case differs from the one before us, inasmuch as reference was therein made to a particular person as guilty of murder. The difference is, however, in degree only, and not in principle. Here, although the charge does not point to any particular person, it is emphatically declared that the crime of bribery and receiving bribes by public officers has been recently committed in Douglas county, accompanied by direction to the jurors to indict some person or persons therefor, and a reminder that a demand has come up from the people for a forward march, and that a patient and long-suffering endurance has at last reached its limit. We must not be understood as intimating that the presiding judge is in every case prohibited from assuming that indictable offenses have been committed, concerning which it is the duty of the grand jury to inquire. We can conceive of cases which may be committed in *facie curiæ* and possibly others, of which it is the duty of courts to take notice without proof; but such cases are exceptions. Here, according to the record, and as conceded by the State, the crime of bribery was a pure assumption, perhaps correctly assumed, but of which the judge possessed such information only as was derived from current rumor. The reference to the conditions of the public sentiment above mentioned is especially unfortunate, and for which the charge is justly subject to criticism. Public sentiment in a representative government controls in the solution of political questions, but we recognize in it a dangerous force when it seeks to dictate judicial decisions. So potent is this proposition that further discussion of the question is deemed superfluous.

BANKS AND BANKING—CERTIFICATE OF DEPOSIT — NEGOTIABILITY. — In Kirkwood v. First National Bank, the Supreme Court of Nebraska hold that a certificate of deposit, in the usual form, issued by a bank, and made payable to order or bearer is negotiable, and a *bona fide* purchaser thereof for value, before maturity without notice of equities, is protected to the same extent as an innocent holder of other negotiable paper that the negotiability of such a certificate is destroyed neither by a stipulation that it is payable on return or the certificate properly indorsed, nor by a provision that it is payable in current funds, nor by a provision that it shall bear interest if left six months, but no interest after six months and that a certificate of deposit as follows: "This certifies that A B has deposited in this bank $3,000, payable to order of self, in current funds, on return of this certificate properly indorsed. This deposit not subject to check. With interest at six per cent. if left six months. No interest after six months,"—is overdue, so as to charge purchasers with notice of equities, after the expiration of six months, and not until then. The court said in part:

So far as the character of the instrument is concerned, as being a certificate of deposit, and for the present disregarding its particular phraseology, this court has said that: "The established doctrine is that a certificate of deposit, in the usual form, issued by a bank, and made payable to order or bearer, is negotiable; and a *bona fide* purchaser thereof for value, before maturity, without notice of equities, is protected to the same extent as an innocent holder of other negotiable paper." First National Bank v. Security National Bank, 34 Neb. 71. Was there anything upon this certificate to take it out of the general rule, and render it non-negotiable? It is argued that the provision that it should be payable "on return of this certificate properly indorsed" destroys its negotiability. That, however, was the language of the certificate in First National Bank, *supra*, and these certificates were there treated as negotiable paper. It has, indeed, been frequently said that the stipulation for the return of the certificate adds nothing to the instrument. It is merely the expression of a rule which applies to all negotiable paper, and an action may be maintained without a previous presentment. This question was thoroughly considered in the case last cited. As to the requirement that it should be properly indorsed, it would seem that an indorsement by the payee would not be necessary. A "proper" indorsement is such an indorsement as the law merchant requires in order to authorize a payment to the holder. If presented by the original

payee, no indorsement would be proper, or at least necessary. If presented by another, "proper indorsement," to show his title, would be requisite. We do not think that this provision operates as a condition destroying the negotiability of the instrument.

It is next said that the amount of payment is uncertain, and the instrument for that reason non-negotiable. This argument is predicated chiefly upon the provision that the certificate is payable "in current funds." We are aware that many courts have held that such a clause does not require payment in money and destroys the negotiability of the instrument. The cases so holding are either cases arising at a time when many forms of bank notes and bills were in use, varying in their values, or cases decided upon the authority of that class without regard to changed conditions. With regard to existing conditions we think the Supreme Court of the United States has declared the law correctly in Bull v. Bank, 123 U. S. 105, as follows: "Within a few years, commencing with the first issue in this country of notes declared to have the quality of legal tender, it has been a common practice of drawers of bills of exchange or checks, or makers of promissory notes, to indicate whether the same are to be paid in gold or silver or in such notes, and the term 'current funds' has been used to designate in fact any of these, all being current and declared by positive enactment to be legal tender. It was intended to cover whatever was receivable and current by law as money whether in form of notes or coin. Thus construed we do not think the negotiability of the paper in question was impaired by the insertion of those words." This also is the doctrine of the Court of Appeals of New York. Pardee v. Fish, 60 N. Y. 265. And the Supreme Court of Illinois has held that a check so drawn entitles the holder to demand coin or its equivalent. Insurance Co. v. Kupfer, 28 Ill. 332. We are satisfied with the reasoning in these cases as against the contrary authorities, and therefore hold that a provision for payment in current funds is in effect for payment in money, and that such an instrument if having no other requisites is negotiable.

It is also contended that the negotiability of the instrument was destroyed by uncertainty of amount, arising from the provision that it should draw interest at six per cent. if left six months, but no interest after six months. In Lamb v. Story, 45 Mich. 488, it was held that the negotiability of a note payable on or before two years from date was destroyed by a memorandum attached providing that if paid within one year there should be no interest; and that case is cited by Mr. Daniel in support of a similar statement, and is the only authority cited. We are not satisfied with that doctrine.

In Hope v. Barker, 112 Mo. 338, the provision was: "Without interest thereon, if paid at maturity. If not paid at maturity, to bear interest from date." It was held that that provision did not destroy the negotiability of the note; the note, on its face, showing what should be paid at any particular time, and being therefore certain in its terms. The Circuit Court of Appeals for the sixth circuit has recently held that a provision for interest after maturity, and attorney's fees, did not render a bill non-negotiable, saying: "It is intended to be a circulating medium until maturity. For this purpose, every purchaser must know exactly what will be, or ought to be, paid on it at maturity. It only has currency upon the hypothesis that it is to be paid at that time. If the sum then to be paid is fixed and certain, we do not see why that is not sufficient." Farmers' Nat. Bank v. Sutton Manuf'g Co., 3 C. C. A. 1, 52 Fed. Rep. 191. We think the same reasoning applies here. Every purchaser has, upon the face of the note, evidence of the exact amount to be paid. If he takes it within six months, he knows that the amount to be paid, if presented within that period, is the face of the certificate, without interest; that if presented at the end of six months, or at any subsequent time, the amount is the face of the certificate, with interest for six months at the rate of 6 per cent. Nothing could be more certain or more absolute. When did the certificate become due, so as to charge a purchaser with notice of equities? There could be no doubt that, if the certificate had provided simply for payment upon presentment properly indorsed, it would be, in effect, a promissory note payable on demand, and would be overdue, so as to charge a purchaser with notice, at the latest, after the lapse of a reasonable time for presentment. Daniel Neg. Inst. 783. But the terms of this instrument are different. It was to draw interest if left six months, but in no event to draw interest after six months. In First Nat. Bank v. Security Nat. Bank (*supra*), an instrument payable upon the return of the certificate properly indorsed, bearing across its face the language, "This certificate payable three months after date, with six per cent. interest per annum for the time specified," was held to be payable three months after date. There the language was absolute, and the construction given was undoubtedly correct. We should here follow the rule adopted in that case, and so construe the certificate as to give effect to every part. It would seem that the result would be to reach an analogy to instruments payable "on or before" a certain date, which are due at the expiration of the time so fixed, and not before. Mattison v. Marks, 31 Mich. 421; Daniel, Neg. Inst. § 43. Surely, a purchaser reading this certificate within six months from its date, observing that, if presented before the expiration of six months, it would draw no interest, but if presented at the end of that period would bear interest, would be justified in presuming that it had not been presented. Equally certain it is that seeing it after the expiration of six months, and observing by its terms that it could draw no interest thenceforth forever, he would be put upon inquiry to ascertain why it had not been presented when interest ceased. We think the instrument should be treated, so far as ascertaining the rights of purchasers, as one payable on or before six months after date, or, if not, that then, from the peculiar nature of the contract, six months after date should be treated as the reasonable time within which it should be presented, and a purchaser taking it within that period should be considered as a purchaser before maturity. Adopting, then, the conclusions we have outlined, this was a negotiable instrument, which a *bona fide* purchaser for value, within six months from its date, would be entitled to enforce against the defendant.

CRIMINAL LAW — FORMER JEOPARDY — WHEN IT BEGINS.—The Supreme Court of Louisiana, in the case of State v. Robinson, 15 South. Rep. 146, very accurately draws the line as to what period of a criminal trial jeopardy begins, holding that when the jury is impaneled and sworn the defendant has reached the period of jeopardy the repetition of which the constitutional provision protects. Watkins, J., says:

In this case the accused was indicted at the Septem-

ber term, 1893, for the crime of larceny, and he was placed on trial, and a jury, were duly impaneled and sworn, and the indictment read. At this stage of the proceedings the district attorney requested a temporary suspension of the trial, for the purpose of preparing an application for a continuance, in order to enable him to procure the testimony of an absent witness. This application was granted; the proceedings were temporarily suspended; the motion of continuance was filed, argued, and submitted; this case was continued for the term, and the jury impaneled to try the case were discharged,—the defendant objecting, and retaining a bill of exceptions to the ruling of the judge. At the February term of 1894, the defendant objected to going to trial, on the ground that he had been once in jeopardy, and was discharged and released from the prosecution by reason of the continuance of the cause, under the circumstances detailed; and to that end he filed a plea of previous jeopardy. This motion was overruled, and he retained a bill. Over his objection, the trial was thereafter proceeded with. He was found guilty, and was sentenced to 18 months imprisonment in the penitentiary, and from that sentence he prosecutes this appeal. The question propounded is whether the accused was put in jeopardy by the impaneling of the jury of trial, and the reading to them of the indictment (no testimony having been adduced), and did the discharge of the jury, and the continuance of the case, operate his release from further prosecution? the continuance of the case, and the discharge of the jury being over the defendant's objection and exception. It appears, as a matter of fact, that the principal witness on behalf of the State, had been duly summoned, but was not found by the sheriff, and that certain depositions which had been taken before an examining magistrate, and deposited in the clerk's office, were missing, and could not, after diligent search, be found. In order to obtain the testimony, the district attorney had requested a continuance of the case; and the judge assigned as the reason for granting it that the application proceeded upon the theory that the State was surprised that a part of the public archives of the clerk's office could not be produced and that that fact did not evidence want of due diligence on the part of the district attorney, in not having previously advised himself of the loss, as that officer had the right to presume the record was in its proper place. The question of discretion in the judge to grant or disallow the continuance depends, however, on the main question of whether the circumstances related, disclosed that the defendant was in jeopardy at the time it was granted; for if he was, the judge had no discretion in the premises, and if there was no jeopardy, he had. An examination of the authorities has satisfied us that the defendant's plea is good, and should have been maintained. Mr. Bishop defines "jeopardy" thus: 'If, after the jury have been sworn, and thus the jeopardy has begun, the court, contrary to true practice discharges them without a verdict, this is, in law, equivalent to an acquittal; and on motion, without plea, the prisoner is entitled to be set at liberty." 1 Bish. Cr. Proc. § 821. Again, that author says: "When, on completing and swearing of the panel, the jeopardy of the accused begins, and it begins only when the panel is full. Until full, the jeopardy is not perfect. In other words, without a jury set apart and sworn for the particular case, the individual defendant has not been conducted to his period of jeopardy. But when, according to the better opinion, the jury, being full, is sworn, and added to the other branch of the court, and all of the preliminary things of record are ready for the trial, the prisoner has reached the period from the repetition of which our constitutional rule protects him." 1 Bish. Cr. Law, §§ 1014, 1015. In support of this proposition, many authorities and State decisions are collated, but we have examined and cite the following, viz: Wright v. State, 7 Ind. 324; Morgan v. State, 13 Ind. 215; McKenzie v. State, 26 Ark. 334; Hines v. State, 24 Ohio St. 134. In treating of "the essential elements of jeopardy," the following is stated in the American and English Encyclopædia of Law, viz: "If there be not a complete panel of jurors, the trial is a nullity and jeopardy does not attach; and a trial without a jury is void and not a putting in jeopardy. The jury is said to be charged with the prisoner when twelve jurors are duly impaneled and sworn; and, when the jury are thus sworn to try the accused on the charge preferred, jeopardy attaches. If it attaches for the moment only, it is sufficient to put the accused within the provision of the constitution." Volume 11, p. 933, "Jeopardy," § 4, pars. 4. 5. Of the authorities cited as supporting that theory, we cite the following, viz: Bell v. State, 44 Ala. 393; Grogon v. State, *Id.* 9; Newsom v. State, 2 Kelly, 60. But the principle is stated in People v. Webb, 38 Cal. 467, with more accuracy and more elaboration than in any other given case, and the opinion of the court is supported by an array of authorities, English and American. On the foregoing authorities, we consider it a settled principle that, after a jury has been set apart and sworn for the particular case, the defendant has been conducted to his period of jeopardy, and is entitled to the protection of the constitutional bar, in case the jury be set aside against his objection. But this rule is not an absolute one, and applicable to all cases alike. There are exceptional cases, to which the foregoing principles do not apply, as, for instance, where there is any illegality in the composition of the jury, or a disqualified person is found on the panel, or the jury are known to have been guilty of misconduct, for any of which causes the verdict might be set aside. The rule invoked and applied in this case is that when there is a completed jury, duly impaneled and sworn to try the issues joined, and to the legality of which no objection is urged, the accused is, at the moment, placed in jeopardy. But there is no conflict between the principle announced herein and that stated by the court in State v. Nash, 46 La. Ann.——, 14 South. Rep. 607, to which we adhere. For these reasons, we are of opinion that the verdict and sentence pronounced against the defendant should be annulled and reversed."

CAN A PRESIDENT APPROVE A BILL AFTER THE ADJOURNMENT OF CONGRESS?

The recent decision of Judge Knott of the United States Court of Claims, in which the learned judge decided that the president has the right to approve a bill after the adjournment of congress, provided he does so within ten days of said adjournment, is of the utmost importance, and adds a valuable precedent to constitutional law. This is the second instance since the organization of the government that such exercise of the power of approval has been called into question. Many writers on this subject have been of the opin-

ion that the President does not possess that power; but an examination of the question, I think, will show that there is no valid reason to deny him the right to approve a measure within ten days after the adjournment of congress. In discussing the subject, it is necessary first to ascertain what part the president plays in legislation.

Article I, section 7, clause 2 of the constitution, provides that every bill which shall have passed the house of representation and the senate shall, before it becomes a law, be presented to the president of the United States—if he approve it he shall sign it—but if not, he shall return it with his objections to that house in which it shall have originated. And if both houses of congress pass that bill again by two-thirds majority, the bill shall become a law. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless congress, by their adjournment, prevent its return, in which case it shall not be a law. Thus a bill may become a law: 1st, by approval of the president; 2d, by congress passing it notwithstanding the president's objection by two-thirds majority, and, 3d, by the refusal of a president to act on a bill within ten days after its presentation to him. Is then the president a part of the legislative department? We know that it was the intention of the constitutional convention to establish a national government consisting of a legislature of two houses, an executive and a judiciary (Randolph's resolution). And such a government was established. Article I, section 1: All legislative powers herein granted shall be vested in congress of United States, which shall consist of a senate and house of representatives. Article II, section 1, clause 1: The executive power shall be vested in a president of the United States of America. Article III: The judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as congress may from time to time ordain and establish. It certainly never was the intention of the framers of the constitution to make the executive department part of the legislative department. Each department was to be coordinate and interdependent of the others. In giving the president a veto power, the constitution merely furnished him with a weapon with which to defend himself, and one with which to protect the public from unwise and hasty legislation. Hamilton, in the 73d paper of the Federalist, writes: "The propensity of the legislative department to intrude upon the rights of and to absorb the powers of the other departments has been already more than once suggested. The necessity of furnishing each with constitutional arms for its own defense has been inferred and proved. From these clear and indubitable principles results the propriety of a negative of the executive upon the acts of the legislature branches. It not only serves as a shield to the executive, but it furnishes an additional security against the enaction of improper laws. It establishes a salutary check upon the legislative body.

The primary inducement to conferring the power in question upon the executive is to enable him to defend himself, secondary to increase the chances in favor of the community against passing bad laws through haste, inadvertence or design. Chancellor Kent, 1 Com. 239; Mr. Justice Story, 4th Ed., Secs. 881-891; Von Holst Constitutional Law, pp. 112, 113, and Cooley on Constitutional Law, 159-163, accept Hamilton reasons for giving the president a qualified veto.

It is true that many writers on constitutional law and on the constitution speak of the president as being a third branch of the legislature. But he cannot be said to be a part in the strict sense of the word "legislature," for he can neither originate measures (his power being limited to recommendation), nor can he amend measures (his power being limited to return measures setting forth his objections and suggesting amendments), and finally his approval is not necessary to enact measures, for bills may become laws without his signature, or by being passed notwithstanding his objections, by two-thirds vote of congress. Taking into consideration, then, the meaning of the word "legislate," the intention of the framers of the constitution to organize a government of three co-ordinate branches, and finally the fact that a bill may become a law without the approval and notwithstanding the disapproval of the president, it necessarily follows that the president cannot be said to be a part of the legislative depart-

ment of the government. If this is so, then the objection usually urged against the rights of the president to sign a bill after adjournment of congress, viz: that upon the adjournment of congress the legislative function of the president dies *eo instanti*, has no force.

The question under discussion presents many phases: First, has the president the right to sign a bill after the adjournment of congress in his own term, *e. g.*, could President Cleveland approve a measure after the present congress adjourns, say in March, 1895? This I take it is the case just decided by Judge Knott of the Court of Claims. Strange to say there is only one other instance in the history of the country of a president signing a bill after the adjournment of congress. President Lincoln approved "an act to provide for the collection of abandoned property and for prevention of frauds in insurrectionary districts within the United States." This act was passed on March 3d, 1863, and congress adjourned at midnight of the same day. On March 12th, 1863, nine days after the passage of the act, President Lincoln approved it. Considerable litigation arose under that act, and its constitutionality was brought into question in a suit under it in 1883. The Court of Claims which had jurisdiction of the matter refused to consider the question, but said "the validity of the statute has never been drawn into question. The Supreme Court has acted on cases brought under it as if it had been a valid law. Congress recognized its validity by amending it July 4th, 1864, referring to it as the "act of March 12th, 1863." Hodges Case, 18 Ct. of Claims, 700.

With the exception of this case and the one just decided by Judge Knott, none others are reported. But are these cases not sound? Is there anything in the constitution that forbids the president to sign a bill after the adjournment of congress, provided he do so within ten days of the time in which it was presented to him? Article I, section 7, clause 2, of the constitution, allows the president ten days to act on a measure, and then provides that such measure shall be a law if the president does not act upon it unless congress, by its adjournment, prevents the return, in which case it shall not be a law. Mr. Justice Story (Commentaries, Sec. 891) gives the following reason for that proviso: "But if this clause (ten day provision) stood alone, congress might in like manner defeat the due exercise of his qualified negative by the termination of the session which would render it impossible for the president to return a bill."

Accepting his reasoning, does that prevent a measure from becoming a law on the approval of the president within ten days notwithstanding the adjournment of congress in the meantime; decidedly not. Everything that congress can do has been done. Some say that the president would be deprived of the privilege of giving his reasons for vetoing it, provided he desired to do so. Can he not state his reasons is he chooses? Does not the bill fail if it is not signed? Then, even, granting that he would be deprived of this privilege, is that a good reason why he should be denied the right to approve it? Here again public policy should be taken into consideration. It is customary for the president to go to the capitol during the last days of the session to sign bills, and in order to gain time the hands of the official clock are turned back, and in this rush, in these last moments, bill after bill is signed without being considered carefully. Now, the intention of the framers of the constitution was to have the president guard against hasty, unwise and injurious legislation, and they also intended that he should act prudently, wisely and deliberately in examining bills. Would not the public be served better if he were permitted to do so? The fact that a bill cannot become a law without the approval of the executive if congress adjourns before he has held the same ten days, cannot apply to a measure that he approves for by statutory enactment a bill after its approval is returned, not to congress, but is sent to the secretary of State (Rev. Stats., Sec. 204).

The State governments have found it advantageous to allow their executive the privilege of approving bills after the adjournment of the legislature, and many have constitutional amendments to that effect. But before these amendments were adopted the governors of several States assumed that right. In New York, Georgia, Louisiana and Illinois, this has been done. In all these States the constitutional provisions relating to the enactment of laws are similar to those of the federal constitution.

In People v. Bowen, 21 N. Y. 517, the court said: "The power of the governor to approve and sign a bill presented to him within ten days previous to the adjournment of the legislature, does not cease with the adjournment." In Illinois an action was brought under an act of the legislature of that State, and it was contended that the act was invalid. The act was approved on March 7, 1867, but the legislature had adjourned on February 28th. The case was carried to the Supreme Court of the United States where it was affirmed. (Seven Hickory v. Ellery, 103 U. S. 423.) Chief Justice Waite said: "The single question we have now to consider, is whether a bill passed by both houses and presented to the governor before the legislature adjourns, becomes a law when signed by the governor after the session of the legislature has been terminated by an adjournment, but within ten days from its presentation to him. We have no hesitation in saying that it does. There is certainly no express provision of the constitution to the contrary. All that instrument requires is, that before any bill which has passed the two houses can become a law it shall be presented to the governor. If he approves it he may sign it. If he does sign it within the time the bill becomes a law. That is not said in so many words, but is manifestly implied. After a bill has been signed the legislature has nothing more to do with it. Undoubtedly if the legislature should be in session when the signing is done, it would not be inappropriate for the governor to communicate his approval to one or both the houses; but there is nothing in the constitution which requires him to do so. The filing of the bill by the governor in the office of the secretary of State with his signature of approval on it is just as effectual in giving it validity as a law, as its formal return to the legislature would be. The bill becomes a law when signed. Everything done after that is with the view to preserving the evidence of its passage and approval."

The reasoning of the learned chief justice applies with equal force to an act of congress, for the provisions of the Illinois constitution are similar to those of the federal constitution. Can the president sign a bill after the adjournment of a session? Undoubtedly. Here granting that the president is a part of the legislative system, he still has the right, for the same legislature is still in session, one branch has merely suspended action. If the executive desires to state reasons for vetoing the bill he sends them to congress when it reassembles. For the same reasons the president has the power to sign a bill after a recess of congress.

If the view contended for be adopted by the supreme court, some may ask the question, can an incoming president approve a bill which has been passed during his predecessor's term by a congress which expired by constitutional limitation? The answer must be in the negative. Nor is such an answer inconsistent with the reasoning herein. Such a bill cannot become a law, because the provisions of the constitution cannot be complied with, viz: it cannot be presented to the president during the life of the congress in which it originated.

Inasmuch, then, as there are no constitutional provisions against the exercise of the right herein contended for, and such right would be in the interest of public policy, the supreme court should affirm the recent decision of Judge Knott, in case it is called upon to review the same.

Cincinnati, Ohio. MAX B. MAY.

CHATTEL MORTGAGES — CROPS TO BE PLANTED — RIGHTS OF SUBSEQUENT PURCHASER.

ROCHESTER DISTILLING CO. V. RASEY.

Court of Appeals of New York, June 5, 1894.

A chattel mortgage on crops to be thereafter planted is void as against a subsequent purchaser at an execution sale.

GRAY, J.: (after stating the facts). I think this case does not, in principle, differ from any other case where a chattel mortgage has been given upon property in expectancy, and which has no potential existence at the time of its execution. The fact that the subject of the mortgage is a crop to be planted and raised in the future upon land does not affect the determination of this question upon established principles. It may be that precisely such a case, in its facts, has not been passed upon in this court; but there are expressions of opinion in several cases of a kindred nature in the reports of this court and of other courts in this State which leave us in no doubt as to the doctrine which should govern. The proposition that a mortgage upon chattels having no actual or potential existence can operate to charge them with a lien when they come into existence, as against an attaching or an execution creditor, has frequently been discountenanced and repudiated. Grantham v. Hawley,

Hob. 132, is the general source of authority for the proposition that one may grant what he has only potentially, and there is no good reason for doubting that that which has a potential or possible existence, like the spontaneous product of the earth or the increase of that which is in existence, may properly be the subject of sale or of mortgage. The right to it when it comes into existence is regarded as a present vested right. That which is, however, the annual product of labor and of the cultivation of the earth cannot be said to have either an actual or a potential existence before a planting. This action being one at law, the inquiry is limited to ascertaining the strictly legal rights of two contending creditors to the property of their debtor, Powell, in the crops which he had raised. It is unlike some of the cases which have arisen between the lessor of land and his lessee. In such a case, a different principle might operate to create and support the lien of the landlord upon the crops as they come into existence upon the land. The title to the land being in him, an agreement between him and the lessee for a lien upon the crops to be raised to secure the payment of the rent would operate and be given legal effect as a reservation at the time of the title to the product of the land. That was the case of Andrew v. Newcomb, 32 N. Y. 417, where the owner of land agreed with another that he might cultivate it at a certain rent, the crop to remain the property of the landlord until the tenant should give him security for the rent. Judge Denio repudiated the idea that the arrangement could be called a conditional sale of the flax, because the subject was not in existence. He held that the idea of a pledge or of a sale had no application, and that the effect of the contract was to give to the landlord the original title to the crop. His remarks upon the subsequent vesting of the title to crops, when they come into being, have reference to such an arrangement between landlord and tenant, and not to the case of a mortgage or conditional sale to some third person of crops yet to be planted. Mr. Thomas in his work on Chattel Mortgages, upon the subject of mortgaging a crop not yet planted, says (section 149): "The weight of authority inclines to the view that the lien is an equitable one, and differs in some respects from the charge created by a mortgage of property in existence at the date of the agreement." And, again, he says: "The authorities are mainly to the effect that such a mortgage conveys no title or interest as against attaching or judgment creditors of the mortgagor." About this question of mortgaging personal property to be subsequently acquired much has been written in the books which I deem unnecessary to resume here at any great length. It results from a review of the authorities that a mortgage cannot be given future effect as a lien upon personal property which, at the time of its delivery, was not in existence, actually or potentially, when the rights of creditors have intervened. At law such a mortgage must be conceded to be void. The mortgage could have no positive operation to transfer *in praesenti* property not *in esse*. At furthest, it might operate by way of a present contract between the parties that the creditor should have a lien upon the property to be subsequently acquired by his debtor which equity would enforce as against the latter.

In Bank v. Crary, 1 Barb. 542, Paige, J., observed: "I strongly incline to the opinion that a chattel mortgage can only operate on property in actual existence at the time of its execution; that it cannot be given on the future products of real estate; and that, if given one day or one week before the product of the land comes into existence, it is as inoperative as if the chattel mortgage had been given on a crop of grass or grain one, two, or three years previous to its production." In a subsequent case the same learned judge considered the nature of a mortgage relating to property not then in existence, and its effect as to creditors of the mortgagor. In Otis v. Sill, 8 Barb. 102, the plaintiff claimed under a chattel mortgage which, after describing the property mortgaged, contained the following clause: "All scythes manufactured out of the said iron and steel, and all scythes, iron, steel, and coal which may be purchased in lieu of the property aforesaid." Subsequently, the property was taken under executions issued on judgments, and the action was brought for its taking and detention. Paige, J., refers to his opinion in Bank v. Crary, that a chattel mortgage could only operate on property in actual existence at the time of its execution. He elaborately discusses the question of whether such a mortgage was a lien upon the property when acquired, as against the creditors of the mortgagor, and reviews very many authorities in England and some in this country. His conclusions were adverse to the proposition. He held that, as to subsequently acquired property, the mortgage could only be regarded as a mere contract to give a further mortgage upon such property, and that no specific lien was created thereby. He says: "I have come to the conclusion, as the result of all the authorities, that if the mortgage in this case did amount to a contract to execute a further mortgage on subsequently acquired property, it was good as an executory contract only, and did not constitute a lien on the articles of the kind mentioned therein when subsequently purchased." In Gardner v. McEwen, 19 N. Y. 123, the chattel mortgage to the plaintiff upon property in the store, "or which might thereafter be purchased and put into store," was held inoperative to convey the title to the after-acquired property, as against the defendant, who purchased it at a sale under execution upon a judgment against the mortgagor. McCaffery v. Woodin, 65 N. Y. 459, was an action in trover. Plaintiff was lessee and defendant was agent for the lessor. The former covenanted in the lease that the latter should have "a lien, as security for

the payment of the rent," on all the personal property, etc., which should be put upon the premises, "and such lien to be enforced, on the non-payment, of the rent, by the taking and the sale of such property in the same manner as in cases of chattel mortgages on default thereof." By virtue of this provision in the lease, the defendant took the farm produce. The decision upheld the rights of the landlord to do so, holding that as the crops came into existence they vested in the landlord. It is to be noted that the court considered the case as one to be governed by equitable principles, observing that "the matter comes up solely between the parties, there being no intervening rights of creditors." Referring to Gardner v. McEwen, *supra*, it was remarked that that "is a case between the mortgagee and creditors, and was affected by our act concerning filing chattel mortgages." Treating the question as one for the application of equitable principles, it was held that the lessor was entitled to set up her equitable rights as a defense to the plaintiff's (the lessee's) action of trover. In the same case, Gray, C., observed that, if the relation of mortgagor and mortgagee had been created between the parties, "it was inoperative upon any property, which at the time of its execution was not actually or potentially possessed or owned by McCaffrey." In Cressey v. Sabre, 17 Hun, 120, where the opinion was delivered by Boardman, J., and was concurred in by Learned and Bockes, JJ., a chattel mortgage upon potatoes (among other articles of property) which were not yet planted, was held inoperative. The distinction was there mentioned between a case like McCaffrey v. Woodin, where the question of title was between the parties to the contract and one where it arose between the mortgagee and a third person. In Coats v. Donnell, 94 N. Y. 168, Andrews, J., observed that "a contract for a lien on property not *in esse* may be effectual in equity to give a lien as between the parties, when the property comes into existence and where there are no intervening rights of creditors or third persons." Kribbs v. Alford, 120 N. Y. 519. 24 N. E. Rep. 811, recognizes the invalidity at law of a chattel mortgage of property thereafter to be acquired; but holds that, as between the parties, their contract would be construed in equity as creating an equitable lien, which could be enforced. The idea of a chattel mortgage is that of a conveyance of personal property to secure the debt of the mortgagor, which, being conditional, at the time, becomes absolute if, at a fixed time, the property is not redeemed; and the statute makes its valid as against creditors of the mortgagor only when filed as directed. The statute provides for the filing as a substitute for "an immediate delivery," or "an actual and continued change of possession of the things mortgaged." Such provision seems to me to exclude the idea of a chattel mortgage upon non-existent things, or that such an instrument could operate to defeat the lien of an attaching or an execution creditor upon subsequently acquired property. Regarding the chattel mortgage in question as a mere executory agreement to give a lien when the property came into existence, some further act was necessary in order to make it an actual and effectual lien as against creditors. But there were no further act by the parties to the instrument to create such an actual lien, and the levy of the execution upon the crops operated to transfer their possession from the owner to that of the sheriff. As against his possession, the equities of the mortgagee are unavailing for any purpose. Between the two creditors, it is a question of who had gained the legal right to have the crops in satisfaction of his claim, and the equitable right of the mortgagee to them, as against his debtor, was defeated by the seizure at the instance of the judgment creditor. We are satisfied as to the correctness of the conclusion reached by the general term below that there should have been a direction of a verdict for the plaintiff for the potatoes and beans obtained from the plainting done after the execution and delivery of the mortgage. The order appealed from should be affirmed, and, under the stipulation, judgment absolute should be ordered for the plaintiff, with costs in all the courts. All concur, except Earl, J., not voting. Ordered accordingly.

NOTE.—In most of the States every species of personal property which is capable of absolute sale and which has any actual or prospective existence may be the subject-matter of a chattel mortgage. 6 Lawson's Rights, Remedies and Practice, p. 4998; Dorsey v. Hall, 7 Neb. 460; Kimball v. Sattley, 55 Vt. 290; 3 American & English Encyclopædia of Law, p. 183. But it is generally agreed that a mortgage of personal property of which the mortgagor has no possession or right of possession, and which is not the natural product of property of which he has possession or right of possession, is invalid against prior creditors subsequently obtaining judgment and levying upon the property before delivery. Parker v. Jacobs, 14 S. Car. 112. A valid chattel mortgage, therefore, on growing crops, may be made by the owner thereof, provided they had a potential and substantial existence at the time. Minnesota Linseed Oil Co. v. Maginnis, 32 Minn. 193; Rider v. Edgar, 52 Cal. 127; Stevens v. Tucker, 55 Ga. 543; Robinson v. Ezzell, 72 N. Car. 231; Moore v. Byrum, 10 S. Car. 452; Cook v. Steel, 42 Tex. 53; Wintermute v. Light, 46 Barb. 278; Orcutt v. Moore, 134 Mass. 48. A crop is said to be growing as soon as it is sown or planted. Wilkinson v. Ketler, 69 Ala. 435; Cotten v. Willoughly, 83 N. Car. 75. It has even been held in some cases that a crop to be planted on one's own land or on land to be let to him as well as a crop planted and in process of cultivation, is the subject of a valid mortgage. Rawlings v. Hunt, 90 N. Car. 270; Robinson v. Ezzell, 72 N. Car. 231; Thrash v. Bennett, 57 Ala. 156; Hurst v. Bell, 72 Ala. 336; Watkins v. Wyatt, 9 Baxt. (Tenn.) 250; Apperson v. Moore, 30 Ark. 56; Argues v. Wasson, 61 Cal. 620; Conderman v. Smith, 41 Barb. 404. But the weight of authority is with the decision of the court in the principal case to the effect that a mortgage on a crop before it is planted is absolutely void and conveys no title whatever. Hutchinson v. Ford, 9 Bush.

318; Cressey v. Sabie, 17 Hun, 120; Comstock v. Scales, 7 Wis. 159; Milliman v. Neher, 20 Barb. 37. With respect generally to after acquired property the rule in equity is that if the language of the mortgage covers it and it is in existence at the date of the mortgage a valid lien as between the parties may be given on it. Beall v. White, 94 U. S. 382; Hughes v. Wheeler, 66 Iowa, 641; Argues v. Wasson, 51 Cal. 620; Case v. Fish, 58 Wis. 50; Allen v. Goodnow, 71 Maine, 420. But it is invalid as against attaching creditors or subsequent purchasers. Jones v. Richardson, 10 Met. 481; Roy v. Goings, 96 Ill. 362; Goodrich v. Williams, 50 Ga. 425.

CORRESPONDENCE.

COLLATERAL ATTACK ON DEFECTIVE ATTACHMENT AFFIDAVIT.

To the Editor of the Central Law Journal:

In your number dated June 15, on page 504, is reported the case of Grocery Co. v. Draham, Supreme Court of Washington. This case decided that a deed based on an attachment proceeding, in which the affidavit for attachment was defective, was void and subject to collateral attack. In perhaps the majority of States this has become a rule of property, but certainly the case you report is not well considered since it appears to be one of first impression in Washington. The strongest and best authorities are the other way. (Cooper v. Reynolds, 10 Wall. 308; Matthews v. Dinsmore, 109 U. S.; Heidtler v. Oil Cloth Co., 112 U. S.; Voorhees v. Bank, 10 Peters, 449), and none of them are considered in this case. Logically the situation of the res, and not the affidavit for attachment, is the essential jurisdictional fact. Such a rule as is announced in the Washington case is against a sound public policy as well as against sound reasoning, in the absence of any controlling statute, many titles, in some States especially, are founded upon attachment proceedings and this rule tends to invite attacks on such titles. I was of counsel in a case lately decided by the Texas Court of Civil Appeals (Beulli v. Wagner, not yet reported), in which after careful consideration, it was held that a sheriff's deed made on foreclosure of an attachment lien was not void and subject to collateral attack because of a defective affidavit, but merely voidable on direct attack.

Victoria, Tex. SAM'L B. DABNEY.

HUMORS OF THE LAW.

If a man were to give another an orange, he would merely say, "I give you this orange;" but when the transaction is entrusted to the hands of a lawyer to put it in writing, he adopts this form: "I hereby give, grant and convey to you all and singular my estate and interest, right title, claim and advantage of and in the said orange, together with all its rind, skin, juice, pulp and pips, and all right and advantage therein, with full power to bite, cut, suck, or otherwise eat the same orange, or give the same away, with or without its rind, skin, juice, pulp and pips, anything hereinbefore or hereinafter, or in any other deed or deeds, instrument or instruments, of what nature or kind soever to the contrary in any wise notwithstanding."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCOUNT—Actions.—One who has an account for articles sold, the different items of which constitute separate transactions, and the entire amount of which exceeds the jurisdiction of a justice, may split it up so as to bring his actions within the jurisdictional amount, the account not having become an account stated, by reason of being presented as a whole, and not objected to within a reasonable time.—SIMPSON v. ELWOOD, N. Car., 19 S. E. Rep. 598.

2. ADMINISTRATION — Decedent's Estate.—Where an administrator, before his removal, transferred a non-negotiable note belonging to the estate to one of his individual creditors as collateral security for his debt, his successor may recover possession thereof from the holder, though the former administrator, at the time he transferred the note, was a creditor of the estate.—HENDRICK v. GIDNEY, N. Car., 19 S. E. Rep. 598.

3. ADMINISTRATION — Right to Dower.—A widow's right of dower is unaffected by the administrator's sale of realty to pay debts of the deceased, whether such debts be a lien on the land, or simple contract debts of the estate.—WHITEAKER v. BELT, Oreg., 36 Pac. Rep. 534.

4. ADVERSE POSSESSION AGAINST ESTATE.—Though one has color of title to land, he acquires title by adverse possession to none by planting some part of it to tobacco every year for more than the statutory period; no part being planted for more than two years, and each part being inclosed only for the time it is cultivated.—HAMILTON v. ICARD, N. Car., 19 S. E. Rep. 607.

5. APPEALS—Forfeiture of Bail.—An appeal from the judgment of forfeiture of a bail bond in a criminal case lies to the court of criminal appeals, not to that of civil appeals.—JETER v. STATE, Tex., 26 S. W. Rep. 49.

6. APPEAL — Jurisdictional Amount.—The amount involved on appeal from a judgment sustaining a demurrer to a reply seeking to avoid, as to part, only, of the amount claimed by the complaint, the statute of limitations, set up by the answer to the whole claim, is only the amount as to which the reply seeks to avoid the statute.—BOARD OF COM'RS OF DEARBORN COUNTY v. KYLE, Ind., 36 N. E. Rep. 1090.

7. APPEAL—United States—Jurisdiction.—The United

States have a right to appeal from any judgment of any amount rendered against them under Act March 3, 1887, authorizing suits to be brought against the United States.—UNITED STATES v. YUKERS, U. S. C. C. of App., 60 Fed. Rep. 641.

8. APPLICATION OF PAYMENTS.—Payments made on a running account, where not otherwise appropriated by either of the parties, will be applied to the oldest items.—SHUFORD v. CHINSKI, Tex., 26 S. W. Rep. 141.

9. ASSIGNMENT FOR BENEFIT OF CREDITORS — Preferences.—Where a debtor, previous to making a general assignment, transfers to a creditor a portion, in excess of one-third, of his assets, such transfer is not void, under Laws 1887, ch. 503, forbidding preferences in assignments in excess of one third of the debtor's actual assets, in the absence of proof of fraud, but the preference is reduced to the limit mentioned.—ABEGG v. BISHOP, N. Y., 36 N. E. Rep. 1058.

10. BANKS—Checks—Action by Holder.—The holder of a check can sue the bank for the amount specified therein, if the drawer had funds in the bank sufficient to pay it when it was presented, though it was not accepted, or certified to as good, by the bank.—SIMMONS HARDWARE CO. v. BANK OF GREENWOOD, S. Car., 19 S. E. Rep. 502.

11. BOUNDARIES—Courses and Distances.—In an action to settle the boundary line between two tracts of land, where the surveys were made at the same time, by the same person, and call for each other, but no boundary line was fixed on the ground, a space left between them, according to the surveyor's field notes, will be apportioned to the owners of the tracts in proportion to their respective interests.—WARE v. MCQUINN, Tex , 26 S. W. Rep. 126.

12. BOUNDARIES—Patent—Latent Ambiguity.—Where a boundary, as described in a patent, was not surveyed on the line there indicated, there is a latent ambiguity in respect to such boundary, and evidence is admissible to prove its original location.—KANNE v. OTTY, Oreg., 36 Pac. Rep. 537.

13. BUILDING ASSOCIATIONS—Withdrawal Value.—A member of a building association alleged that he had paid on his stock a certain amount, and given the notice of withdrawal required by the by laws; that the directors had failed to ascertain the withdrawal value of his stock; and that, under the by laws, he was at least entitled to all he had paid, and prayed judgment therefor and general relief. Defendant answered, setting up its by-laws, and that it had thereunder ascertained the value of the stock at a certain sum: Held, that the court properly allowed plaintiff such admitted value, though more than that alleged by him.—INTERNATIONAL BLDG. & LOAN ASS'N v. BIERING, Tex., 26 S. W. Rep. 39.

14. CARRIERS — Interstate Commerce.—Where a railroad company, engaged only in carrying between two points in the same State, carries goods from one of its termini to the other, without any understanding or arrangement that it should become a link in a chain of transportation from points outside the State, the mere facts that the goods began their journey at a point out side the State, and that the carrier outside the State undertook to ship them to their ultimate destination, does not render their carriage by the domestic company an act of interstate commerce.—FT. WORTH & D. C. RY. CO. v. WHITEHEAD, Tex., 26 S. W. Rep. 172.

15. CARRIERS—Limitation of Liability.—Where several connecting carriers are partners in the transmission of freight, a stipulation in the contract of shipment that the company shall not be liable for injuries to the property after it has passed beyond its line does not relieve it from liability for such injuries.—GULF, C. & S. F. RY. CO. v. WILSON, Tex., 26 S. W. Rep. 131.

16. CARRIERS—Limited Railroad Ticket.—A railroad ticket, limited on its face to certain time for passage, is not good after its expiration, and one who is on a train, demanding passage upon it, and refuses to pay otherwise his fare, may be ejected from such train, no more force being used than necessary, and, though injury result to the party from a lawful ejection, it is not a ground of action.—GROGAN v. CHESAPEAKE & O. RY. CO., W. Va., 19 S. E. Rep. 563.

17. CARRIERS—Passengers—Negligence.—A carrier is not responsible for injuries to a passenger, resulting from the act of an intending passenger, who, being about to pass through a car door, pushed it open violently, causing it to injure the passenger.—GRAEFF v. PHILADELPHIA & R. R. CO., Penn., 28 Atl. Rep. 1107.

18. CARRIERS OF PASSENGERS — Sleeping-car Companies—Baggage.—The duty of sleeping-car companies to protect their passengers from thieves cannot be waived by words printed upon the passenger's ticket, or notices posted in the car, as such a stipulation is unreasonable.—STEVENSON v. PULLMAN PALACE-CAR CO., Tex., 26 S. W. Rep. 112.

19. CERTIORARI TO JUSTICE.—A judgment of a Circuit Court upon a writ of *certiorari* reversing a judgment of a justice, setting aside the verdict of a jury on which the judgment was based, and granting a new trial, is a final judgment, though it retain the case for retrial, and cannot be set aside on mere motion at a subsequent trial.—MORGAN v. OHIO RIVER R. CO., W. Va., 19 S. E. Rep. 588.

20. CHATTEL MORTGAGES — Complaint.—A complaint to redeem, alleging that after the maturity of plaintiff's mortgage the assignee of the mortgage took possession of the chattels, and has ever since held possession, selling portions of them, is defective for failure to allege that the assignee has not proceeded to foreclose, sell, and turn over the surplus to plaintiff, as provided by the terms of the mortgage.—CROWE v. LA MOTT, Mont., 36 Pac. Rep. 452.

21. CONFLICT OF LAWS.—A person under sentence of death in another State may sue in Arkansas.—WILSON v. KING, Ark., 26 S. W. Rep. 18.

22. CONFLICT OF LAWS—Insurance—Contract.—A Vermont corporation did business as a life insurance company in the State of New York, having an office and an agent in New York city. A resident of New Jersey effected insurance in such company by delivering, through his agent, an application to its general agent in New York, and receiving the policy there from such agent: Held, that the contract of insurance was a New York contract, and subject to the laws of that State as to forfeiture for non-payment of premiums.—HICKS v. NATIONAL LIFE INS. CO., U. S. C. C. of App., 60 Fed. Rep. 690.

23. CONSTITUTIONAL LAW — Executive and Judicial Powers.—The power of the governor over the fire and police board of the City of Denver, in respect to orders of appointment and removal, depends entirely upon the terms of the charter, as amended by the legislature in 1893; and it is the province of the courts to construe such legislative act, in cases of actual litigation arising thereunder.—PEOPLE v. MARTIN, Colo., 36 Pac. Rep. 543.

24. CONSTITUTIONAL LAW — Tax— Insurance Companies.—Mansf. Dig. § 5591, providing that a State tax shall be levied upon every "traveling agent" of any life insurance company doing business in the State, endeavors to levy an occupation tax, and is unconstitutional.—STATE v. WASHMOOD, Ark., 26 S. W. Rep. 11.

25. CONTRACTS — Condition Sales.—Where a vendee accepts, after a fair trial, a machine sold under a provision that he may return it if unsatisfactory, he cannot afterwards rescind the contract.—MCGILL v. HALL, Tex., 26 S. W. Rep. 132.

26. CONTRACT—Equity—Performance.—It is the general rule that, where an option to be exercised or a condition to be performed is not limited by the agreement, then such option must be acted upon and condition performed or abandoned within a reasonable time.—HANLY v. WATTERSON, W. Va., 19 S. E. Rep. 586.

27. CONTRACT—Infancy.—An executory contract of an infant is not binding, unless he has confirmed it since

his majority.—SAVAGE v. LICHLYTER, Ark., 26 S. W. Rep. 12.

28. CONTRACTS—Joint or Several.—An agreement by which "plaintiffs are to pay to said L," and "plaintiffs are to pay in addition," etc., is a joint obligation.—ELLER v. LACY, Ind., 36 N. E. Rep. 1088.

29. CONTRACTS—Merger of Proposal.—A written contract showed that A sold to B lumber according to B's orders, in quantity not to exceed the capacity of A's sawmill, at certain prices and dimensions; A to manufacture at dimensions specified by B so long as it did not interfere with his regular cut: Held, that a prior letter was inadmissible to show an intention to sell the entire output of the mill.—PINE GROVE LUMBER CO. v. INTERSTATE LUMBER CO., Miss., 15 South. Rep. 105.

30. CONTRACT — Money paid for Another's Use. — Where a contractor on a building abandons the work, leaving the workmen unpaid, and the owner tells the contractor's bondsman that there is enough money coming on the contract to complete the building and directs him to pay the workmen, so that the work shall go on, and says that he will refund the money, the owner can be sued in contract for the money so paid as for money paid to and for his use.—DIBBLE v. DE MATTOS, Wash., 36 Pac. Rep. 485.

31. CONVERSION — Evidence.— Where, in an action against L and another, the petition alleges that defendants seized and converted certain property described, of which plaintiff was the owner, it is error to admit evidence that L was sheriff, and that the acts of which plaintiff complained were done by one of L's deputies under process against another person. — LEWIS v. HATTON, Tex., 26 S. W. Rep. 50.

32. COUNTER-CLAIM—Maturity.—Code Civ. Proc. § 89, permitting a defendant in certain actions to plead a new matter constituting a defense a counter-claim existing, does not admit of a counter-claim maturing after the action is begun.—MCGUIRE v. EDSALL, Mont., 36 Pac. Rep. 453.

33. COUNTY WARRANT—Rate of Interest.—Gen. St. § 216, requires the county treasurer, when he has not funds to pay a county order presented, to indorse it, "Not paid for want of funds," with the date of the indorsement, and provides that from such time the order shall draw "legal" interest: Held, that, where orders were so indorsed prior to Act Feb. 21, 1893, which reduced the legal rate of interest from 10 to 8 per cent., interest at 10 per cent. was a part of the contract, and the rate on the orders was not reduced thereby. — UNION SAV. BANK & TRUST CO. v. GELBACH, Wash., 36 Pac. Rep. 467.

34. COURTS— Mandamus.— *Mandamus* is the proper remedy to compel the exercise of jurisdiction by the the Circuit Court, which it is erroneously refusing to assume contrary to the express provisions of a constitutional and valid statute.—WHEELING BRIDGE & T. RY. CO. v. PAULL, W. Va., 19 S. E. Rep. 551.

35. CRIMINAL EVIDENCE—Arson.— Where, on trial for arson, charging defendant as an accomplice, it appears that the principal has testified as to his own guilt, error cannot be predicated on the subsequent admission of the testimony of the wife of the principal as to a conversation overheard by her, between her husband and defendant, in reference to the burning.—BLUMAN v. STATE, Tex., 26 S. W. Rep. 75.

36. CRIMINAL EVIDENCE—Homicide.—The admission of a confession as to having killed deceased, which was extorted by threats, is harmless, when he has never denied the act, but merely pleaded self-defense; and does not affect his detailed account of the matter, made after his arrest, when under no immediate apprehension.—STATE v. COELLA, Wash., 36 Pac. Rep. 474.

37. CRIMINAL EVIDENCE — Robbery.—On a trial for robbery, evidence of declarations of the complaining witness as to the fact that defendant had robbed him, made several blocks from where it is alleged to have occurred, and in the absence of defendant, is inadmissible as *res gestae*.—SHOECRAFT v. STATE, Ind., 36 N. E. Rep. 1113.

38. CRIMINAL LAW—Bond to Stay Execution.—Though a bond conditioned for the prisoner's appearance and obedience to all orders of court be given and approved pending a motion for a stay of execution and for a new trial, such approval does not, by implication, stay the execution, and the prisoner may be lawfully imprisoned pending the motion for a new trial.—STATE v. REYNOLDS, Mont., 36 Pac. Rep. 449.

39. CRIMINAL LAW—Burglary.—Where a person residing in a livery stable opened the unlocked door of an oat bin and stole oats therefrom, it is not such a "breaking" as to constitute the crime of burglary, under Pen. Code, art. 714, providing that, where the theft is committed by an inhabitant of the house, there must be an actual breaking.—PETERS v. STATE, Tex., 26 S. W. Rep. 61.

40. CRIMINAL LAW—Confession by Silence.—Where a party remains silent, who has an opportunity to speak, after something has been said in his presence and hearing which give rise in some fairly appreciable degree to the natural and reasonable inference that it calls for a reply, being otherwise relevant, it should go to the jury for what, in their opinion, it may be worth as evidence of acquiescence.—STATE v. BELKNAP, W. Va., 19 S. E. Rep. 507.

41. CRIMINAL LAW — Gaming — Public House. — An "opera house," in which there have been but two performances in the last six months, and which is closed between performances, is not such a "public house" that a single card game played therein is punishable under Pen. Code, art. 355.—GALLOWAY v. STATE, Tex., 26 S. W. Rep. 67.

42. CRIMINAL LAW— Impeachment of Witness.— On trial for murder, where the defendant attempted to show that one of his own witnesses had made a different statement after the homicide than on the trial, the State may show that such statement was substantially as given in his testimony.—STATE v. MANVILLE, Wash., 36 Pac. Rep. 470.

43. CRIMINAL LAW— Jurisdiction.—Code, § 1197, providing that in all cases of felonious homicide, when the assault shall have been made in the State, and the person assaulted shall die without the limits thereof, the offender shall be indicted and punished in the county where the assault was made, does not confer upon the State authority to prosecute a person for murder who, while standing within its boundaries, wrongfully shoots across the line, and kills a person in another State, although the murderer and deceased are citizens of the former State.—STATE v. HALL, N. Car., 19 S. E. Rep. 602.

44. CRIMINAL LAW—Larceny.— Where one induces another by promise of employment, to deposit with him a sum of money as security for funds to be handled by the employee, intending at the time to convert the money to his own use, which he subsequently does, he is guilty of larceny. — PEOPLE v. TOMLINSON, Cal., 36 Pac. Rep. 506.

45. CRIMINAL LAW—Plea after Demurrer Overruled.—Defendant withdrew his plea of not guilty, and demurred to the indictment. His demurrer being overruled, time was given him to plead, but no further plea was made, and trial and conviction followed: Held, no trial. The plea withdrawn was not reinstated by the overruling of the demurrer; nor could issue be had on the theory of a refusal to plead, without a formal entry by the court; nor could defendant's going to trial waive the need of a plea.—PEOPLE v. MONAGHAN, Cal., 36 Pac. Rep. 512.

46. CRIMINAL LAW—Recognizance — Amendment. — The amendment of a recognizance on appeal after the adjournment of the term at which it is entered is void. —MILLER v. STATE, Tex., 26 S. W. Rep. 71.

47. CRIMINAL LAW— Theft. — "United States paper currency money" includes treasury notes, commonly

called "greenbacks," silver certificates, and gold certificates.—RUCKER v. STATE, Tex., 26 S. W. Rep. 65.

48. CRIMINAL LAW—Theft — Presumption of Guilt.—An instruction that possession of property is presumptive evidence of guilt, but that a natural and reasonable explanation rebuts such presumption, unless shown to be false, is erroneous, as such possession and explanation are merely facts for the jury, and the instruction hinges the conviction upon the falsity of the explanation, and not upon defendant's guilt.—POLLARD v. STATE, Tex., 26 S. W. Rep. 70.

49. CRIMINAL LAW—Witness—Conviction of Crime.—Where defendant, on presentation by the State of a witness is permitted without objection to elicit from him, for the purpose of showing his incompetency, that he had been convicted of a crime, and had not been pardoned, he should have been held incompetent, the right to have his conviction shown by the records thereof being waived by the State.—WHITE v. STATE, Tex., 26 S. W. Rep. 72.

50. CRIMINAL PRACTICE—Burglary.—An indictment in the usual form, charging burglary with intent to steal, is not defective, in that, it should have charged actual theft after entry.—CLARK v. STATE, Tex., 26 S. W. Rep. 68.

51. DEATH BY WRONGFUL ACT—Damages.—In an action by adult children against a railroad company for damages for the death of their mother, caused by the negligence of defendant, allegations that deceased aided in the support of plaintiffs, and cared for them in sickness, and that they expected a continuance of these benefits, is sufficient to show damage.—SAN ANTONIO & A. P. RY. CO. v. LONG, Tex., 26 S. W. Rep. 114.

52. DECREE — Validity—Fraudulent Representations.—A woman who is fully informed of all the terms and stipulations of a consent decree, and who is advised by able lawyers, and by the chancellor himself, cannot, after receiving pursuant thereto a large sum in cash, which she does not offer to return, avoid the execution of the decree by claiming that she was misled, and by setting up alleged promises and representations contemporaneous with or subsequent to the original decree.—NEW ENGLAND MORTGAGE SECURITY CO. v. TARVER, U. S. C. C. of App., 60 Fed. Rep. 660.

53. DEDICATION — Acceptance.—To render a dedication evidenced by acts and declarations irrevocable, it must have been consummated by an acceptance.—FRENCH v. SCHEUBER, Tex., 26 S. W. Rep. 133.

54. DEDICATION OF PUBLIC CROSSING.—Where a railroad company for 18 years permitted the public to use a street across its right of way as a public crossing, allowed it to make improvements thereon, parted its trains to permit persons and vehicles to pass through, and recognized its existence as a duly laid out public street in a map required by the statute to be filed as a public record, an intent to dedicate it to the use of the public in common with itself will be presumed.—LAKE ERIE & W. R. CO. v. TOWN OF BOSWELL, Ind., 36 N. E. Rep. 1103.

55. DEED—Construction.—An instrument filled out on a printed warranty deed form, reciting a consideration of one dollar, and natural love and affection to the grantee (the grantors' son), conveyed two tracts, and also "all our right, title, and interest in and to our homestead in said V survey, should we not sell or dispose of the same before death," as to such homestead, in view of the grantors' possession of it up to their death, was testamentary, not a deed vesting a present estate.—WREN v. COFFEY, Tex., 26 S. W. Rep. 142.

56. DEED — Estoppel.—A description of land, in a deed, as "bounded upon an alley," estops the grantor, and those claiming under him with notice, from interfering with the grantee's use of such alley.—ROGERS v. BOLLINGER, Ark., 26 S. W. Rep. 12.

57. DETINUE — Demand.—One who owns a house standing on another's land cannot recover damages of the latter for withholding possession, without first making demand to be allowed to enter and remove it.—EASTMAN v. COMMISSIONERS OF BURKE COUNTY, N. Car., 19 S. E. Rep. 599.

58. ELECTION—Ballot Clerks.—While the election law requires the ballot clerks to be of opposite politics, the mere fact that such is not the case is not, sufficient alone to justify the exclusion of the poll from the court.—DIAL v. HOLLANDSWORTH, W. Va., 19 S. E. Rep. 557.

59. ESTOPPEL — Bona Fide Purchasers.—When the holder of a record title of land applies for a mortgage loan thereon, and a third person advises the lender that such applicant owns the land, and the lender loans the money, taking a mortgage without knowledge of any adverse claim, such third person is estopped to set up, as against the mortgagee, any adverse claim.—STEWART v. CROSBY, Tex., 26 S. W. Rep. 138.

60. EVIDENCE—Admissions.—In an action against a telegraph company for non delivery of a message, a letter from the company's attorney, containing no admissions of liability, but offering to return, as a matter of business courtesy, the charges paid, is inadmissible.—WESTERN UNION TEL. CO. v. THOMAS, Tex., 26 S. W. Rep. 117.

61. EVIDENCE—Best and Secondary.—In order to render secondary evidence of the contents of a deed admissible, it must be proved that diligent search was made therefor, and its loss must be proved by the person in whose custody it was at the time of the loss, if living, or if dead, search must be made among his papers.—BALDWIN v. GOLDFRANK, Tex., 26 S. W. Rep. 155.

62. EXECUTION—Interest of Partner.—Since Rev. St. art. 2295, provides that a partner's interest in the firm property shall be levied on by leaving a notice with one of the partners, individual creditors of a partner, who seize and sell the partnership property on an execution against him, are liable in damages to the members of the firm.—CURRIE v. STEWART, Tex., 26 S. W. Rep. 147.

63. FEDERAL COURTS—Mistake in Decrees.—Mistake of counsel, whereby a decree is entered which does not conform to the opinion of the Circuit Court, cannot be corrected by that court after the lapse of the term.—DOE v. WATERLOO MIN. CO., U. S. C. C. (Cal.), 60 Fed. Rep. 648.

64. FERRY—Real Property.—A ferry franchise is real property.—MABURY v. LOUISVILLE & J. FERRY CO., U. S. C. C. of App., 60 Fed. Rep. 645.

65. FRAUDULENT CONVEYANCE — Action to set aside Pleading.—In an action to set aside, as fraudulent, a deed made by a judgment debtor, a complaint which alleges that at the time of the conveyance, and of bringing suit, the debtor had no other property subject to execution, need not also allege that the property conveyed was subject to execution, since, if it were exempt, that is matter of defense.—SLAGEL v. HOOVER, Ind., 36 N. E. Rep. 1099.

66. FRAUDULENT CONVEYANCE—Husband and Wife.—Where a conveyance from husband to wife was kept unrecorded for several months, during which time he used his apparent title to the land for the purpose of obtaining credit, a decree finding the conveyance fraudulent as to creditors whose claims accrued during that time will not be reversed, though the wife swears that the land was originally bought by the husband for her, and paid for with her own money.—ADAMS v. CURTIS, Ind., 36 N. E. Rep. 1095.

67. FRAUDULENT JUDGMENT — Equitable Relief. — Where a bill to enjoin the collection of a judgment obtained by fraud is not brought until a year after the discovery of the fraud, and does not show that complainant has a meritorious defense to the action, but does show that he left the State, leaving the action pending, with no one looking after it, and made no inquiries concerning it for 10 years, a demurrer will be

sustained.—HOLLINGER v. REEME, Ind., 36 N. E. Rep. 1114.

68. GARNISHMENT—Writ—When Returnable.—An order indorsed upon an attachment, requiring a garnishee to appear and answer, is process. It must be returnable to the next term of the court. If it be not so returnable, but skips a term, and is returnable to the second term after its issuance, it is void.—CODA v. THOMPSON, W. Va., 19 S. E. Rep. 548.

69. GUARANTY—Construction.—Plaintiff wrote to defendant firm that H, the nephew of one of the partners, had bought his "opening bill" of goods, and asked if defendant guarantied it, to which the latter replied that, "in regard to purchase of H, we guaranty payment of same to amt. of $4,500:" Held, that this was not a continuing guaranty which covered subsequent purchases.—AUERBACH v. HOLLEY, Tex., 26 S. W. Rep. 83.

70. HIGHWAY—Obstruction—Dedication.—On a trial for obstructing a public road, evidence that defendant ran a fence out into a highway about 40 feet, deflecting travel upon land owned by himself, and that the public used the new route for about 8 years, is not conclusive proof of defendant's intent to dedicate the new route to the public.—AYERS v. STATE, Ark., 26 S. W. Rep. 19.

71. HIGHWAY—Obstruction.—Where a person knowingly obstructs a highway, it is no defense that he acted in obedience to orders of a superior officer of a railroad company, and had no evil intent.—SANDERS v. STATE, Tex., 26 S. W. Rep. 62.

72. HOMESTEAD—Fraudulent Conveyance.—The rule that a conveyance of a business homestead cannot be attacked as in fraud of creditors does not apply when, though the deed is absolute on its face, for an express consideration of cash and a mortgage debt assumed, there was a parol agreement to reconvey after a certain time, since, if the deed was only to secure the grantee for what he should pay on the assumed debt, it was a mortgage, and if to give him the temporary use of the premises in consideration of his payment of the debt, it was a lease, and in either case the exemption ceased with the grantor's use and possession, and the property became subject to levy by his creditors.—TAYLOR v. FERGUSON, Tex., 26 S. W. Rep. 46.

73. HOMESTEAD—Leased Land.—A house built on land leased for three years, and used by its owners for a home and boarding house,—they having no other residence, though occasionally renting one for a time, intending to return,—is the community's homestead.—ANHEUSER-BUSCH BREWING ASS'N v. SMITH, Tex., 26 S. W. Rep. 94.

74. INFANT—Emancipation—Debt of Parent.—Where a father has relinquished all right to the earnings of his minor son, property purchased by the son therewith cannot be attached for a debt of the father.—FURRH v. MCKNIGHT, Tex., 26 S. W. Rep. 95.

75. INSURANCE—Additional Insurance.—The holder of a policy conditioned against other insurance, on discovering after a loss that his wife had also insured the property, is bound in good faith to at once reveal the existence of such other policy to his insurer, and to unequivocally disclaim any benefit thereof.—MCKELVY v. GERMAN-AMERICAN INS. CO. OF NEW YORK, Penn., 28 Atl. Rep. 1115.

76. INTOXICATING LIQUORS—Keeping open Saloon.—A motion to quash an indictment charging defendant with keeping open his saloon on an election day, on the ground that the election was not legally authorized, will not be granted, as its validity cannot be collaterally attacked, where it is held under the forms of law.—WEAR v. STATE, Tex., 26 S. W. Rep. 68.

77. JUDGE—Disqualification.—A judge is not disqualified to try a nuisance case becausd he was a member of the city council when it dealt with the same controversy—WATERS-PIERCE OIL CO. v. COOK, Tex., 26 S. W. Rep. 96.

78. JUDGMENT.—Where a decree of foreclosure, obtained by default, fraudulently included the mortgagor's homestead, the decree will be vacated as to the homestead, where the mortgagor was not culpably negligent.—WILLIAMS v. LUMPKIN, Tex., 26 S. W. Rep. 103.

79. JUDGMENT LIEN—Parties.—In a suit under section 7, ch. 139, Code, 1891, to subject land to a judgment lien, if there be liens thereon by deeds of trust the trustee and creditors therein must be made formal parties; and they do not become *quasi* parties, so as to affect their rights, by notice to lienholders.—BANSIMER v. FELL, W. Va., 19 S. E. Rep. 545.

80. LANDLORD AND TENANT—Eviction.—Plaintiff was lessee of one of several buildings standing together, and owned by the same person, but with separate sidewalls. The owner had begun to take down the building adjoining plaintiff, when it appeared that plaintiff's side wall had been supported by the wall taken away, and had become so unsafe that the authorities compelled the demolition of both buildings: Held, that this was an eviction, since plaintiff was entitled, throughout his term, to the lateral support afforded when he took the lease.—SNOW v. PULITZER, N. Y., 36 N. E. Rep. 1059.

81. LIEN—Logger's Lien—Foreclosure.—The right to a logger's lien under the law existing when the laborer makes his contract is a vested right, and is not affected by a subsequent repeal of the law.—GARNEAU v. PORT BLAKELEY MILL CO., Wash., 36 Pac. Rep. 463.

82. LIFE INSURANCE—Conditions of Policy.—An application for life insurance, which was agreed to be a part of the contract, warrantied the answers of the assured to questions asked therein to be "full, true, and complete," and the policy was conditioned to be void if they were not so. One of the questions demanded the name and address of each physician who had attended the assured within a given period; and the answer gave the name and address of a single physician. As a matter of fact three physicians had attended the assured within the period named: Held, that the answer was untrue and, being a breach of the warranty, vitiated the policy and destroyed the right to recover thereunder.—BRADY v. UNITED LIFE INS. ASS'N., U. S. C. C. of App., 60 Fed. Rep. 727.

83. MANDAMUS—Compelling Carrier to Operate Line.—The State Supreme Court has no jurisdiction to compel an interstate railroad company to operate its road within the State, in the face of a general strike, on the allegation that enough competent men are willing to work "for reasonable compensation."—STATE v. GREAT NORTHERN RY. CO., Mont., 36 Pac. Rep. 458.

84. MARRIED WOMAN—Validity of Contract.—A married woman's contract, except in regard to her separate estate, is absolutely void whether entered into by herself or on her behalf by her husband.—FRAZEE v. FRAZEE, Md., 28 Atl. Rep. 1105.

85. MASTER AND SERVANT — Assumption of Risk.—Plaintiff, a superintendent of bridges and assistant superintendent of construction for defendant, had just inspected a line, half tied, in process of construction, and in the course of his employment rode over it on a construction train of which he had control, which was wrecked and he injured: Held, that a derailment caused by bad loading, bad track, excessive speed, or all together, gave him no ground of action against the company.—EVANSVILLE & R. R. CO. v. BARNES, Ind., 36 N. E. Rep. 1092.

86. MASTER AND SERVANT—Wrongful Discharge.—In an action by a servant for wrongful discharge, declarations as to the length of time for which he was hired, made by one who had full charge of defendant's business, with authority to employ and to discharge men, are admissible as against defendant.—WESTERN UNION BEEF CO. v. KIRCHEVALLE, Tex., 26 S. W. Rep. 147.

87. MECHANIC'S LIEN—Judgment.—From a judgment, in an action to foreclose a mechanic's lien, holding the contractor and the alleged owner of the building each liable for a portion of the materials furnished by

plaintiff, and declaring the amount due therefor a lien on the building, such owner, alone, appealed; and the cause was reversed on the ground that the action could not be maintained against him, because he was not sole owner: Held, that the judgment against the contractor remained in force, as the statute provides that a party not joining in an appeal shall derive no benefit therefrom, except from the necessities of the case.—LITTELL V. MILLER, Wash., 36 Pac. Rep. 492.

88. MORTGAGE — Merger.—Where a mortgagor conveyed the mortgaged premises to the mortgagee by deed, the mortgage does not merge, but is superior to the lien of one who bought the property prior thereto, under sale on a judgment against the mortgagor junior to the mortgage.—JEWETT V. TOMLINSON, Ind., 36 N. E. Rep. 1110.

89. MORTGAGE—Validity.—An instrument stating on its face that it is a mortgage made to secure debts named therein is a mortgage, though containing no condition of defeasance, if there is no provision for applying any surplus to the payment of other debts.—SCHNEIDER V. MCCOULSKY, Tex., 26 S. W. Rep. 170.

90. MORTGAGE NOTE—Foreclosure.—The holder of a concurrent mortgage note has the right to assert his preference for payment on the proceeds of the sale of the mortgaged property over the transferrer, the payee of the note, by third opposition.—GUMBLE V. BOYER, La., 15 South. Rep. 84.

91. MORTGAGE OF MARRIED WOMEN.—A mortgage given to secure a husband's debt cannot be enforced against the wife where the mortgagee knew that she claimed the land, though it stood in the husband's name, and that her execution of the mortgage was procured by fraud and coercion.—AULTMAN & TAYLOR CO. V. FRASURE, Ky., 26 S. W. Rep. 5.

92. MUNICIPAL CORPORATION—Invalid Corporation.—Laws 1893, ch. 80, providing for the re incorporation of all cities and towns attempted to be incorporated or re-incorporated under the void law of March 27, 1890, which have maintained since the date of their attempted corporation or re-incorporation organized governments, is valid, since it does not seek to legalize void incorporations, but to legislate as to existing, constituted bodies, maintaining the character of municipal corporations under claim of authority.—CITY OF PULLMAN V. HUNGATE, Wash., 36 Pac. Rep. 483.

93. MUNICIPAL CORPORATION—Ordinances—Fire Limits.— An ordinance prescribing a fire limit, and forbidding any person to build, alter, or repair a wooden building therein, without the consent of the board of aldermen, is not unreasonable, as applied to compel the rebuilding of a partly-burned wooden roof with some safer material. — STATE V. JOHNSON, N. Car., 19 S. E. Rep. 599.

94. MUNICIPAL CORPORATION—Power to Issue Bonds.—Under Act Ind. 1847, incorporating the city of Evansville, and authorizing the city "to borrow money for the use of the city," the city has power to issue bonds for money so borrowed. — CITY OF EVANSVILLE V. WOODBURY, U. S. C. C. of App., 60 Fed. Rep. 718.

95. NEGOTIABLE INSTRUMENT— Action—Judgment.—Under Code Civ. Proc. § 667, providing that the judgments in suits on contracts or obligations in writing for the direct payment of money may be made payable in the kind of money specified therein, a judgment payable "U. S. gold coin" is not erroneous, when the note on which it is rendered is payable in "U. S. gold coin."—SHEEHY V. CHALMERS, Cal., 35 Pac. Rep. 514.

96. NEGOTIABLE INSTRUMENTS—Conflict of Laws.—A note executed and delivered in one State and payable in another, is governed, as to the admissibility of defenses against an indorsee, by the law of the latter State, even when sued on in the State wherein it was executed.—STURDIVANT V. MEMPHIS NAT. BANK, U. S. C. C. of App., 60 Fed. Rep. 730.

97. NEGOTIABLE INSTRUMENTS—Indorsement.—An indorsement, "I assign over the within note to P," does not limit the indorser's liability as such.—DAVIDSON V. POWELL, N. Car., 19 S. E. Rep. 601.

98. PARTNERSHIP — Construction of Contract.—An agreement under which one who has mortgaged mining property to secure a debt is to remain in possession and turn over the result of each "clean-up" to the mortgagee, the latter to apply it to the mining expenses and to the payment of the mortgage debt, does not constitute them mining partners, nor render the mortgagee unconditionally liable for the expenses of working the mine.—CHUNG KEE V. DAVIDSON, Cal., 36 Pac. Rep. 519.

99. PLEADING—Amendment.—Where evidence is received, without objection, as to material matters not set up in the pleadings, a refusal of leave to amend so as to conform the pleadings to the real issue tried is reversible error.—COOK V. CROISAN, Oreg., 36 Pac. Rep. 532.

100. PLEADING—Reply to Counterclaim—Departure.—In an action for work and labor done, where defendant sets up a counterclaim for goods furnished, price of wagon, and house rent, a reply that they were not worth the amount claimed, and had been fully paid for by services other than those alleged in the complaint, is not a departure, and is not inconsistent with the complaint.—VAN BIBBER V. FIELDS, Oreg., 36 Pac. Rep. 526.

101. POWER OF ATTORNEY—Construction.—Where one by writing empowers another to sell land, implying a cash sale, and the agent simply transfers the writing to a third person, without payment of purchase money, this is not a sale.—DYER V. DUFFY, W. Va., 19 S. E. Rep. 540.

102. PRINCIPAL AND SURETY—Discharge of Surety.—Where the holder of a note extends it at the request of one maker, and without the knowledge or consent of the other, knowing at the time that the latter maker merely signed the note as surety, the latter is released from his obligation, although the holder did not know of the relation between the two makers at the time the note was given.—SCOTT V. SCRUGGS, U. S. C. C of App., 60 Fed. Rep. 721.

103. RAILROADS—Fires—Presumption.—A charge that if the grass was burned on plaintiff's land as charged, and the fire was caused by sparks from defendant's passing locomotive, the jury may presume that the fire was caused by defendant's negligence, and it is for defendant to rebut this presumption, correctly states the law, and is not objectionable as a charge on the weight of evidence.—GALVESTON, H. & S. A. RY. CO. V. DOLORES LAND & CATTLE CO., Tex., 26 S. W. Rep. 79.

104. RAILROAD COMPANY — Damages — Nuisances.—When one grants to a railroad company a strip of land for its use in the construction of its railroad, all damages to the residue of the tract arising from construction which can be taken into consideration in the assessment of compensation under proceedings for condemnation are released, and he cannot recover therefor against the company, nor can his subsequent alienee of such residue.—WATTS V. NORFOLK & W. R. CO., W. Va., 19 S. E. Rep. 521.

105. RAILROAD COMPANIES — Injury to Persons on Track.—A railroad company is required to exercise ordinary care to ascertain if any one is on its tracks at a private crossing, and to protect a person thereon when in a helpless condition.—YOAKUM V. METTASCH, Tex., 26 S. W. Rep. 129.

106. RAILROAD COMPANIES—Killing Live Stock.—The act of 1887 providing that a railroad company shall be liable for twice the full value of each animal killed by it in case it fails to comply with the statute by recording a description of the animal, and marking its hide, is a penal statute.—ATCHISON, T. & S. F. R. CO. V. TANNER, Colo., 36 Pac. Rep. 541.

107. RAILROAD COMPANY — Lease.—A railroad company chartered by the State cannot, without legislative authority, by lease, or by any other contract or arrangement, turn over to another company its road, and the use of its franchises, and thereby exempt itself from responsibility for the conduct and manage-

ment of the road.—FISHER v. WEST VIRGINIA & P. R. CO., W. Va., 19 S. E. Rep. 578.

108. RAILROAD COMPANY — Negligence.—Each case must depend upon its own facts in determining what shall constitute ordinary care or reasonable prudence in the running of a railroad train.—RAINES v. CHESAPEAKE & O. RY. CO., W. Va., 19 S. E. Rep. 565.

109. RAILROAD COMPANY—Negligence.—Cars were detached from a train and, with the conductor on them, allowed to follow the train on a down grade at a speed of 5 to 12 miles an hour to a highway crossing. At some little distance therefrom the conductor attempted to attract the attention of a person approaching the crossing in a wagon, and set the brakes of two cars, and then, thinking a collision certain, jumped off: Held, that there was negligence.—BAKER v. KANSAS CITY, FT. S. & M. R. CO., Mo., 26 S. W. Rep. 20.

110. RAILROAD COMPANIES—Receivers—Wages.—The court will not confirm the action of the receivers of an insolvent railroad system in reducing the wages and changing the regulations for the conduct of its employees which were in force when the property was turned over to the receivers, where the employees affected are not notified of the proposed changes, and given an opportunity to point out, before the receivers any inequalities or injustice that will be caused by them.—AMES v. UNION PAC. RY. CO., U. S. C. C. (Colo.), 60 Fed. Rep. 674.

111. RAILROAD COMPANY—Stock Killed.—In an action against a railroad company for killing a cow at a private crossing in plaintiff's pasture, an instruction that, if the cow was killed on a public crossing, and the company had fenced its road adjacent thereto, it would be not liable, unless the injury was caused by want of ordinary care on the part of the company's servants, is erroneous.—AUSTIN & N. W. R. CO. v. SAUNDERS, Tex., 26 S. W. Rep. 128.

112. RECEIVERS — Appointment.—An assignee of an insolvent corporation may intervene and be heard on application for the appointment of a receiver of the property of the corporation in another State.—BUSWELL v. SUPREME SITTING OF ORDER OF IRON HALL, Mass., 36 N. E. Rep. 1065.

113. RECONVENTION—When Allowed.—A defendant in a suit on a note cannot reconvene for damages for the prevention of a sale of land caused by the wrongful attachment thereof by plaintiff, where it does not appear that the contemplated sale would have been consummated in the absence of the attachment.—DREW v. ELLIS, Tex., 26 S. W. Rep. 95.

114. SALE—Rescission—Fraud.—In an action to rescind a sale and to recover the goods on the ground that the sale was procured by a false statement, evidence of false statements by defendant, on the faith of which others sold goods to defendant contemporaneously with the sales by plaintiff, is competent to show the fraudulent intent in making the statement to plaintiff.—BLISS v. SICKLES, N. Y., 36 N. E. Rep. 1064.

115. SALE—Rescission—Fraudulent Representations.—A purchaser's right to cancellation of a purchase induced by fraudulent representations is not dependent on insolvency of the seller or the fact that he may or may not have a remedy at law for damages.—MOORE v. CROSS, Tex., 26 S. W. Rep. 122.

116. SALE OF STOCK—Record.—Rev. St. art. 4564, providing that, where persons dispose of certain stock animals as they run on the range "by the sale and delivery of the brands and marks," the purchaser must record the bill of sale, does not apply to a sale of cattle which the vendor has placed in a pasture, and which he designates in the bill of sale as a certain number, bearing a certain brand.—NANCE v. BARBER, Tex., 26 S. W. Rep. 151.

117. SIDEWALK ASSESSMENT—Enjoining Collection—Constitutionality of Law.—A court of equity will not enjoin the collection of a tax assessment on a town lot to pay for the construction of a sidewalk in front of the same, ordained by the council of an incorporated city or town, on the sole ground that such tax or assessment is illegal; some additional circumstances bringing the case under some recognized head of equity jurisdiction must also appear. — WILSON v. TOWN OF PHILIPPI, W. Va., 19 S. E. Rep. 553.

118. SPECIFIC PERFORMANCE—Conditions Precedent.—A covenant in a contract to convey land to a county for a highway and bridge, binding the county to furnish a cattle-way to the river, need not be performed in advance as a condition to a conveyance.—MONTEREY COUNTY v. SEEGLEKEN, Cal., 36 Pac. Rep. 515.

119. SPECIFIC PERFORMANCE. — A deed which has been delivered in escrow pending the fulfillment of the contract of purchase is not the basis of an action to enforce the specific performance of the contract, since a deed cannot be itself the contract for its own execution.—DAVIS v. TALBOT, Ind., 36 N. E. Rep. 1098.

120. SPECIFIC PERFORMANCE—Contract not Signed by Wife.— In an action against F and wife for specific performance of a contract signed by F, only, for the conveyance of community land in consideration of plaintiff's clearing certain other land belonging to defendants, the bill alleged that the husband represented the community; that the wife was in fact a party to the contract; that it was executed at her request; that plaintiff fully performed it on his part; that the wife received the benefits of plaintiff's performance; and that he took possession of the land, with the consent of both defendants, and made valuable improvements thereon: Held, that the facts alleged estopped the wife from denying that she was a party to, or bound by, the contract.—KONNERUP v. FRANDSEN, Wash., 36 Pac. Rep. 493.

121. TAXATION—Abstract Books.—Abstract books are taxable as personal property, though written in a cipher peculiar to the set, and therefore requiring an expert to use them.—BOOTH & HARTFORD ABSTRACT CO. v. PHELPS, Wash., 36 Pac. Rep. 489.

122. TRIAL—Exhibiting Injured Arm to Jury.—In an action to recover damages for injury to a plaintiff's arm, necessitating its amputation, it is not error to allow the plaintiff to exhibit to the jury the naked remnant of the arm.—CARRICO v. WEST VIRGINIA CENT. & P. RY. CO., W. Va., 19 S. E. Rep. 571.

123. VENDOR AND VENDEE—Sale—Rescission.—Where an agreement is rescinded, the general rule is that it must be rescinded entirely, and the parties be placed as near as may be in *statu quo*.—WORTHINGTON v. COLLINS' ADM'R, W. Va., 19 S. E. Rep. 527.

124. WATER COURSE — Draining. — Where one, in draining a marsh from which a stream runs onto another's agricultural land, in connection wherewith it has been used for irrigating and domestic purposes from time immemorial, diverts the water intentionally and without benefit to himself, he will be enjoined.—BARTLETT v. O'CONNOR, Cal., 36 Pac. Rep. 513.

125. WILLS—Construction. — Under a will devising land to S, and providing that "should he die, leaving no child or children," it is to go to B, S takes a fee, and his children do not take as purchasers.—SHAW v. ERWIN, S. Car., 19 S. E. Rep. 499.

126. WITNESS—Transactions with Decedent.—Suit for specific performance of a contract dealing with both real and personal estate, brought by one party against both the personal representative and the heir at law, who is also sole next of kin of the other party to the contract. On the trial the heir at law was offered and sworn as a witness, and testified to transactions with, and statements by, the deceased party: Held, that thereby the complainant was made a competent witness under the act of February 25, 1880 (P. L. p. 52.)—GREENWOOD v. HENRY, N. J., 28 Atl. Rep. 1053.